SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1956

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

IN RE DELVAILLE H. THEARD, DISBARMENT PROCEEDINGS

APPEARANCES:

Delvaille H. Theard, in Proper Person.
George R. Blue, Esq., United States Attorney.

Appeal from the District Court of the United States for the eastern District of Louisiana, to the United States Court of appeals for the Fifth Circuit, returnable within forty (40) days from the 6th day of April, 1955 at the City of New Orleans, Louisiana.

[fol. 2] IN UNITED STATES DISTRICT COURT

MOTION OF UNITED STATES TO SUSPEND FROM PRACTICE DELVAILLE H. THEARD AND ORDER GRANTING SAME—Filed May 19, 1954

On motion of George R. Blue, United States Attorney in and for the Eastern District of Louisiana, and on suggesting to the Court that in the proceedings entitled "Louisiana State Bar Association v. Delvaille H. Theard," this being Cause No. 40,891 for the Supreme Court of Louisiana, the Supreme Court of the State of Louisiana on Monday, March 22, 1954, ordered, adjudged and decreed that the name of Delvaille H. Theard, respondent in said cause, be stricken from the roll of attorneys and his license to practice law in Louisiana be cancelled; that on April 26, 1954, the rehearing applied for by the said Delvaille H. Theard was refused, and the decree rendered as aforesaid on March 22, 1954, became executory, all of which will appear more fully from the true copy of the said hearing and decree attached hereto;

And on further suggesting that in connection with the foregoing, it is required under Rule 1(f) of the General Rules of the United States District Court for the Eastern

District of Louisiana that the said Delvaille H. Theard be suspended forthwith from practice before this Honorable Court, and that, unless he show good cause to the contrary within ten (10) days of notice served upon him, as provided, an order of his disbarment be entered;

It is ordered by the court that the said Delvaille H. Theard be and he is hereby suspended from practice before this Honorable Court; and,

[fol. 3] It is further ordered by the court that unless the said Delvaille H. Theard show good cause to the contrary within ten (10) days, an order of his disbarment herein shall be entered.

New Orleans, Louisiana, this 19th day of May, 1954.

(Sgd.) Herbert W. Christenberry, Judge.

Respectfully submitted: (Sgd.) G. R. Blue, United States Attorney.

CERTIFIED COPY OF PROCEEDINGS FOR DISBARMENT BEFORE THE SUPREME COURT OF LOUISIANA—Filed May 19, 1954

SUPREME COURT OF LOUISIANA

No. 40,891

Monday, March 22, 1954.

LOUISIANA STATE BAR ASSOCIATION

versus

DELVAILLE H. THEARD

Proceedings for Disbarment

HAMITER, Justice.

The instant consideration of this disbarment proceeding, instituted by the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association against Delvaille H. Theard, occurs on opposition to the Commissioner's report. Initially, it is well to briefly review earlier phases of the matter.

Under date of February 2, 1950 the Committee gave notice in writing to respondent that it was undertaking an investigation of certain conduct on his part as a member [fol. 4] of the Bar of Louisiana, the communication detailing and specifying some eleven acts of alleged misconduct and further setting forth that he would be afforded the opportunity of being heard and of defending himself before the Committee.

The contemplated hearing was held in the City of New Orleans on June 5 and 6, 1952, at which respondent was present and represented by counsel of his choice; and, by stipulation, it was restricted to a consideration or investigation of specification No. 1 as listed in the above mentioned communication. The charge therein made was that on January 2, 1935, while engaged in the active practice of law in the City of New Orleans, respondent formed the signatures of Olga Wexler and Alys Senn to a promissory note for $20,000; and that subsequently, having *paraphed* it to appear as an authentic mortgage note, he sold this forged instrument for a valuable consideration to Mrs. Annie W. Forsyth, widow of Julius Forsyth.

In opening the hearing the Committee offered proof of the charged forgery and of respondent's having received, from a representative of Mrs. Forsyth, the sum of $12,601.25 for the note. Then respondent, instead of attempting to contradict such proof, admitted that the signatures on the note were in his handwriting; and, further, he sought to establish (by written reports and by his own testimony and that of others) the existence at the time of a mental illness or a form of insanity which rendered him incapable of wilfully committing the forgery and uttering. For example, under examination by his own counsel, he testified in part:

> [fol. 5] "Q. Mr. Theard, the Committee is investigating, as you know, a matter which appertains to a note dated January 2, 1935, which has been offered in evidence as 'Committee's Exhibit 1.' Will you look at that note and tell me what you remember of its execution (Handing note to witness).
>
> A. You showed me that note in your office, Mr. Rivet. Frankly, I don't remember anything about it.

Q. You won't deny that those signatures on that note are in your handwriting?

A. No. I told you so, and you made the admission. I recognize my handwriting in the signatures and the statement of the reduction of the payment of interest. I recognize that that is my handwriting.

Q. Do you remember selling the original of that note to anybody?

A. No."

On completion of the investigation the Committee petitioned this court for the disbarment of respondent, it alleging his guilt of the charge set forth in specification No. 1 as was proved at the hearing held June 5 and 6, 1952

To the petition respondent tendered several exceptions. Particularly, in one he challenged the right of the Committee to maintain the action in view of his mental illness (as assertedly disclosed by the evidence adduced at the Committee hearing) at the time of the misconduct; and in another he pleaded prescription, laches and estoppel in bar of the disbarment. All exceptions, after having been thoroughly considered, were overruled by us. See 222 La. 328, 62 So. 2d. 501.

[fol. 6] In an application for a rehearing the above specifically described exceptions were reurged and, for the first time, respondent further contended that the "taking away of a lawyer's right to practice, after restoration to health, for acts committed during a mental infirmity precluding conscious guilt, would be inimical to Amendment XIV of the United States Constitution, which prohibits the deprivation of a valuable right without due process of law." The application for a rehearing, following due consideration, was denied.

Thereafter, answer was filed, it containing a general denial of the factual allegations on which the disbarment is sought and, additionally, the following affirmative averments:

"Further answering, respondent says that the act charged as misconduct against respondent occurred nearly eighteen years ago; that at that time respondent was suffering from a mental illness which rendered him incapable of

guilty or wilful conduct and deprived him of the ability to distinguish right and wrong; that he carries no recollection of the act charged against him; that at this late date he is without records and other means of defending himself; that numerous witnesses best acquainted with his condition in January of 1935, and theretofore, have died; that a previous Committee considered and had the opportunity to investigate respondent's conduct; that the compulsion to defend himself against said stale occurrence operates to his prejudice, is essentially unjust, and results in depriving respondent of the procedural due process guaranteed by Section 2 of Article 1 of the State Constitution, and by [fol. 7] the Fourteenth Amendment to the Constitution of the United States.

"Since April 1948, respondent has resumed the active practice of law without any complaint levelled at his conduct.

"Respondent finally says that he never at any time consciously violated any law relating to the professional conduct of lawyers and to the practice of law, nor has he ever wilfully violated any rule of professional ethics."

Later, respondent submitted special pleas of prescription and unconstitutionality which merely reiterated and amplified similar pleas theretofore tendered.

On proper motion, after issue had been joined, Mr. John Pat Little, an attorney at law who had engaged in active practice for a period of not less than ten years, was appointed Commissioner to take the evidence in chambers and to report to this court his findings of fact and conclusions of law. Pursuant to the appointment he held a hearing on March 9 1953, in which the greater part of the evidence offered was that introduced in the proceeding conducted by the Committee on June 5 and 6, 1952. Only three witnesses testified before the Commissioner. One was produced by the Committee in further proof of the forgery and uttering and to show that respondent knowingly committed the unlawful acts. The remaining two were called by respondent merely to identify certain records.

After termination of the hearing the Commissioner prepared and filed a lengthy and well considered written report in which he analyzed the evidence, set forth his findings of

fact, and discussed and announced his conclusions of law. [fol. 8] In summarizing the evidence he commented:

"The commission of the wrongful acts by the respondent is established beyond any doubt; it is even conceded in the respondent's brief to the Commissioner. No evidence was produced by counsel for the Committee, nor even offered, to rebut the alleged mental condition of the respondent. It must then, from the record, be held that the respondent was suffering under an exceedingly abnormal mental condition, some degree of insanity."

With respect to the law determined to be applicable, as well as to his conclusions therefrom the Commissioner observed in part:

"It is the gist of the respondent's argument that being without his mental faculties he was without volition or control over his actions, and, therefore, cannot be guilty of misconduct. * * * This feature of the case rests squarely upon the question of whether, or not, the defense of insanity is sufficient to prevent this Court from disbarring a lawyer who has been found guilty of having forged and uttered a promissory note. * * *

"* * * *

"Having in mind the Court's decision on the exceptions found in 62 So. (2nd) 501 and particularly the portion thereof relating to respondent's exceptions based upon insanity on page 503, the Commissioner is constrained to find that the law as expressed in that opinion does not relieve the respondent from the effects of his actions.

"* * *

[fol. 9] "In conclusion the Commissioner finds that the respondent, Delvaille H. Theard, is guilty as charged of forging and uttering a certain promissory note, dated January 2, 1935, in face amount of $20,000.00, purporting to bear the signatures of Olga Wexler and Alys Senn.

"Commissioner further finds that, as a matter of law, the abnormal mental condition of the respondent at the time of such forgery and utterance does not constitute a defense to disbarment proceeding therefor.

"Accordingly, the Commissioner has no alternative but to recommend to the Supreme Court of Louisiana that a decree of disbarment be entered herein; and that the Court

order the name of Delvaille H. Theard be stricken from the roll of attorneys permitted to practice before that Court."

Now, in opposing the Commissioner's report, respondent first assigns error to the conclusion that the abnormal mental condition existing at the time of the commission of the wrongful acts does not constitute a defense to disbarment.

Influencing that conclusion, as the Commissioner points out, were certain pronouncements of this court made in connection with our consideration of respondent's tendered and overruled exceptions to the petition, they having been as follows: "* * * we do not view the mental deficiency of a lawyer at the time of his misconduct to be a valid defense to his disbarment. Strangely enough, counsel for respondent apparently — taken it for granted that, because evidence has been produced indicating that respondent was probably suffering from amnesia and other mental deficen-[fol. 10] cies at the time of his misdeeds, his insanity (*which we will concede for purposes of this discussion*) operates as a complete bar to this proceeding.

"We think that counsel is mistaken in his assumption. * * * One of the qualities requisite for admission to the bar is that the applicant be of good moral character. When a lawyer has committed peculations, forgeries and breaches of trust, he violates the oath he has taken to demean himself honestly in his practice and the good character he possessed no longer exists. And it will not do for respondent to say that he was suffering from a mental aberration or amnesia depriving him of the ability to distinguish between right and wrong. In disbarment, unlike criminal prosecution or a civil suit for recovery of money based on an offense or quasi offense, consideration of the interest and safety of the public is of the utmost importance for, whereas it may not be humane to punish by confinement to prison one who labored under the inability to understand the nature of his wrongful acts, it is quite another matter to permit such a person to continue as an officer of the court and to pursue the privilege of engaging in the honorable profession of counsellor-at-law when he, by his misconduct, has exhibited a lack of integrity and common honesty. *And in our opinion it matters not whether the dishonest conduct*

stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent." (Italics ours)

Respondent's counsel now argues that the quoted pronouncements and rulings relating to the exception to the petition were merely interlocutory; that they did not con- [fol. 11] stitute the "law of the case"; and that, consequently, they were not binding on the Commissioner in his consideration of the matter. We are unable to agree; and the three cases cited by counsel do not sustain the argument, they being Levy v. Wise et al., 15 La. Ann. 38, Culverhouse v. Marx, 38 La. Ann. 667 and Cusachs v. Dugue et al., 113 La. 261, 36 So. 960. In each of those cases the court considered the question of whether a district judge has the right to revise an interlocutory decree, when the matter affected by it is brought up anew in proper form, and held that he is so empowered. With respect to an appellate court the doctrine prevailing is that its final ruling on an exception is the "law of the case" as to the point covered. See Cusachs v. Dugue, supra, Jacob et al. v. Rochel et al., 164 La. 114, 113 So. 786, State ex rel. Navo v. Baynard, 179 La. 785, 155 So. 225, City of Gretna v. Aetna Life Insurance Company, 207 La. 1085, 22 So. 2d 658.

But if the doctrine were otherwise we know of no good reason for changing our previous ruling. It appears to be logically sound; it is supported by competent authority; and no holdings to the contrary have been brought to our attention.

Under a general heading, entitled "A Commissioner's report should be rejected which does not include findings of all pertinent facts and does not conclude all issues of law", respondent lists in his opposition three complaints which we shall consider in reverse order. It is said: "The Commissioner made no findings of fact on evidence tendered to prove that all of respondent's records had been taken out [fol. 12] of his custody under writs issued long years since." If the issue in this proceeding were whether or not the respondent had committed the wrongful acts with which he is charged, and the missing records were material thereto, the complaint would be justified. But he has admitted the forgery offense and, consequently, the matter of

the loss of some of his records seems irrelevant and unimportant here.

Next he complains: "The Commissioner expresses no conclusion on the legal point that it is essentially unjust to require respondent to defend himself against charges brought more than fourteen years after occurrence of the acts involved in the accusation, and where such acts are not corroborative of recent conduct." The same legal point was advanced in this court on the previous hearing of the exceptions to the petition particularly in connection with the one in which respondent had pleaded prescription and laches. There we observed and ruled:

"The fifth exception of respondent is that of prescription, laches and estoppel. It is asserted that, since the acts complained of occurred more than 17 years ago, the offense is so stale that it would be inequitable and unjust to permit the prosecution of the proceeding and, further, that respondent would be highly prejudiced in defending the suit after the passing of such a great length of time.

"The exception cannot be sustained. Our law of prescription is purely statutory and the fact that a long time has elapsed between the commission of the acts and the bringing of the charges does not, of itself, provide a just [fol. 13] ground for dismissing the suit. Indeed, it appears that respondent was confined to an insane asylum for several years and that he was under a judgment of interdiction from June 1941 until May 7th, 1948, during which time the Committee was unable to act. If respondent has been prejudiced by the delay, this is a matter which can be shown on the merits of the case."

Supplementary to the quoted observations, it may be pointed out that in 1937 a Bar Committee sought to investigate complaints of misconduct on the part of respondent, but action thereon was deferred indefinitely at the request of his uncle who stated that the nephew was then in the insane asylum and interdiction proceedings were pending (they were instituted August 4, 1936).

Although the exception of prescription and laches was overruled, to which ruling we adhere for we are convinced that it was correct, respondent was reserved the right to

show on the merits that he was unjustly prejudiced by the lapse of time. But there is nothing in the record before us from which we can conclude that the delay resulted in prejudice to him in the preparation of a defense.

Finally, respondent asserts: "The Commissioner disposes of respondent's constitutional pleas by erroneously presuming that they have already been decided adversely to respondent." And in his report the Commissioner states: "The additional plea of unconstitutionality seeks to invoke the 14th Amendment to the United States Constitution as a defense. It is claimed that the disbarment of the respondent herein would be a deprivation of his sub-
[fol. 14] stantive rights in violation of that Amendment. This plea is substantially the same as that found in Article IV of respondent's 'Answer with reservation of Exceptions', filed herein and also Article IV of respondent's 'Petition for Reconsideration of Exceptions'. The Court had that answer and that petition before it when a rehearing was denied on January 12, 1953. Your Commissioner must presume that the Court has already considered the constitutional point thus raised and has decided it adversely to the respondent."

The mentioned constitutional pleas were not directly passed upon by us heretofore for the reason that they were offered for the first time in the application for a rehearing on the exceptions to the petition. However, they appear to be without merit. The pleas, quoted above and as we appreciate them, assume that a license to practice law is a natural or a constitutionally granted right. But the assumption is erroneous. As said in 7 Corpus Juris Secundum, verbo Attorney and Client, Section 4(b): "The right to practice law is not a natural or constitutional right, nor an absolute right or a right de jure, but is a privilege or franchise. The right to practice law is not 'property,' nor in any sense a 'contract,' nor a 'privilege or immunity,' within the constitutional meaning of those terms. It cannot be assigned or inherited, but must be earned by hard study and good conduct." See also 5 American Jurisprudence, verbo Attorney at Law, Section 14; State v. Rosborough, 152 La. 945, 94 So. 858; Ex Parte Steckler et al., 179 La. 410, 154 So. 41; In Re Mundy, 202 La. 41, 11

So. 2d. 398; Meunier v. Bernich et al. (La. Court of Appeal), 170 So. 567.

[fol. 15] In the brief of respondent's counsel it is said "that the right to practice law, once granted, does fall under constitutional protection", as is made clear by decisions of the United States Supreme Court in Ex Parte Garland, 4 Wall. 333, 18 L. Ed. 366, and Ex Parte Robinson, 19 Wall. 505, 22 L. Ed. 205. What those decisions stand for, as we read them, is shown by the following extract taken from the latter: "* * * Before a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This is a rule of natural justice and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. * * *"

In the quoted extract the court is not holding that the practice of the profession is a natural, constitutional, or property right. Rather, it is announcing that natural justice requires that an attorney be notified and heard before he is deprived of the privilege of practicing his profession. We agree thoroughly with this principle, and we believe that the stated requirement has been fully met in the instant proceeding.

Petitioner herein (the above named Committee) excepts to that part of the Commissioner's report which holds that respondent "was suffering under an exceedingly abnormal condition, some degree of insanity." It alleges, in its exception, "that, on the contrary, the evidence abundantly shows that he deliberately and *conciously*, and with malice [fol. 16] aforethought, attempted to simulate and feign, and did so simulate and feign, the genuine signature of the alleged makers of the mortgage note, which he now admits was forgery." However, in view of the conclusion reached and hereinabove declared, we need not determine the Committee's exception.

For the reasons assigned it is ordered, adjudged and decreed that the name of Delvaille H. Theard, respondent herein, be stricken from the roll of attorneys and his license to practice law in Louisiana be, and the same is

hereby, cancelled. Respondent shall pay all costs of this proceeding.

Rehearing Refused April 26, 1954.

IN UNITED STATES DISTRICT COURT

ANSWER OF DELVAILLE H. THEARD TO DISBARMENT PROCEEDINGS—Filed May 29, 1954

To the Honorable the United States District Court for the Eastern District of Louisiana:

Comes Delvaille H. Theard, herein notified of a motion and order of date May 19, 1954, wherein appearer is informed that, in view of the decree and opinion of the Supreme Court of Louisiana in the matter of Louisiana State Bar Association v. Delvaille H. Theard, No. 40,891 of the docket of said Court, an order for appearer's disbarment [fol. 17] as an attorney at law and officer of this Court will be entered unless good cause to the contrary is shown by appearer.

And for answer and to show cause, appearer now respectfully submits and says:

The judgment of the Supreme Court of Louisiana, although technically final, is subject to being recalled and reversed and therefore should not at the present time be considered by this Court as a basis for an order of disbarment against appearer. Appearer, in accordance with 28 U.S.C. Sect. 2101 (f), has presented an application to the Supreme Court of Louisiana, praying that the execution and enforcement of its said decree against appearer should be stayed for a reasonable time to enable appearer to obtain a writ of certiorari from the Supreme Court of the United States. Said application for a stay, although filed on May 12, 1954, in said Louisiana Supreme Court, is at the time of the present writing (May 28, 1954) under advisement and not yet acted on. As stated in "Supreme Court Practice" (Stern and Gressman, 1950), p. 189, "generally, the lower Courts are willing to stay the issuance of their mandates pending the filing of a petition for cer-

tiorari." Appearer knows of no reason why his application for stay should be denied. Appearer shows that it would be regrettable that this Court should undertake to act in the present matter adversely to appearer's rights, as long as the decree of disbarment is susceptible not only of being stayed but of being reversed by the United States Supreme Court. The Louisiana Supreme Court has been [fol. 18] informed of appearer's intention to apply for certiorari as permitted by 28 U.S.C. 2101 (c). Further, appearer begs to state that, even should his application for stay and enforcement of its decree be not granted by the Louisiana Supreme Court, this will not preclude his application for review by certiorari by the United States Supreme Court (Carr v. Zaga, 283 U.S. 52, 51 S. Ct. 360, 75 L. Ed. 836), and said application will be duly proceeded with.

For the above reasons, appearer shows to this Court that it would be unwise and it certainly is unnecessary, that mover's application should be considered at the present time, but that this Court should defer consideration of the matter until it is known that appearer is without further redress or opportunity for relief in the premises.

And appearer further shows that the opinion and decree of the Louisiana Supreme Court does not present, as appearer avers most respectfully, any appropriate or just basis for his disbarment.

At every stage of the proceedings for his disbarment in the State Court, appearer duly and properly raised the constitutional question involved in the present case. Appearer was disbarred without just cause or reason and by a decree depriving him of his property without due process of law.

If appearer had been disbarred because of misconduct international and reprehensible or for any reason involving moral turpitude or wilful wrong, appearer would not now undertake to show cause why the decree of the Louisiana Supreme Court should not be operative and binding in this Court. But, as clearly appears from a mere reading [fol. 19] of its opinion, the Louisiana Court based its decree of disbarment on an act committed while appearer was the victim of a mental breakdown, utterly bereft of

reason, and unable to distinguish between right and wrong. Thus appearer was disbarred only because he was ill and irresponsible in 1934, and not for any misconduct which is the only ground on account of which in Louisiana disbarment (a matter wholly controlled by the State Constitution, Art. 7, Sect. 10) can be based.

There is at least one decision of the Supreme Court of the United States and some expressions by the individual Justices which give much weight to appearer's argument that a lawyer's business and means of livelihood, although forfeitable by disbarment for misconduct or any reprehensible wilful act, cannot constitutionally be taken from him because at some remote period of his professional life he was afflicted with a mental infirmity, from which, as no one who knows him can doubt and as demonstrated by his conduct personal and professional since 1948, he has now and since that year, happily recovered. Appearer has never been convicted by any Court of any criminal act. True, appearer was a patient at DePaul *Sanitarium*, a hospital for the mentally afflicted, uninterruptedly for seven years (from 1936 to 1943), and for many months thereafter he was in the care and under the medical treatment of the State medical authorites at the East Louisiana Hospital for the Insane at Jackson, Louisiana. But civil interdiction is not a badge of infamy; good character can never be impaired by conceded mental infirmity; and illness in 1934, 1935 and 1936 can furnish no constitutional [fol. 20] reason for depriving a lawyer of his professional license at any time, certainly not in 1954, when, as cannot be denied, his health is again entirely normal.

In Wieman v. Updegriff, decided by the United States Supreme Court on December 15, 1952, in considering a question of disloyalty through membership in an association listed as subversive in the Attorney General's list, the Court said: " . . . knowledge is not a factor under the Oklahoma statute. We are thus brought to the question . . . whether the due process clause permits a state in attempting to bar disloyal individuals from its employ (as professors in a state educational institution) to exclude persons . . . regardless of their knowledge. For, under the statute before us, the fact of membership

alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one . . . There can be no dispute about the consequences visited upon a person excluded from public employment on loyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy . . . indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power . . . It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary and discriminatory".

How aptly this decision applies to appearer's case, where, putting aside all other considerations (see the last paragraph of the decision) the Louisiana Court visited disbarment upon appearer for an act he committed whilst [fol. 21] he was insane and therefore irresponsible. The exclusion of the Oklahoma professors, in the Updegriff case, was annulled because the Oklahoma statute created a conclusive presumption condemning their membership, however innocent in fact, in an association declared to be subversive. How much stronger in justice and common sense is the position of appearer, a lawyer who has been disbarred for an act committed during insanity and therefore without actionable fault. Appearer believes that this Court is not bound by the decree of the Louisiana Supreme Court in the instant case.

That there must be a substantial reason for a decree of professional suspension or disbarment, and that such decree cannot be considered as binding if the act lacks the element of wrongdoing and is insufficient to serve as a basis for judicial condemnation, is, as appearer submits, strongly emphasized in the dissenting opinions of Associate Justices Black, Frankfurter and Douglas, in the case of Dr. Edward A. Barsky, appellant, v. The Board of Regents of the University of the State of New York, decided April 26, 1954.

Barsky served a prison sentence for contempt of Congress because he refused to furnish certain data and records to a Congressional Committee on the ground that they were privileged. He was further suspended for six months by the action of the Department of Education of the State of New York and his appeal from that suspension finally

reached the Supreme Court of the United States. It will be noted that Dr. Barsky at least actually committed a reprehensible act, whereas appearer has been disbarred by [fol. 22] the Supreme Court of Louisiana on account of an illness and an act resulting therefrom, for which he could not in reason or logic be held responsible.

In the Barsky case, Justice Black said: "I have no doubt that New York has broad power to regulate the practice of medicine. But the right to practice is, as Mr. Justice Douglas shows, a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property. Such a right is protected from arbitrary infringement by our Constitution, which forbids any State to deprive a person of liberty or property without due process of law . . . . Our responsibility is, however, broader. We must protect those who come before us, whether the State Court is empowered to do so or not . . . In this case one can only guess why the Regents overruled their Discipline Committee and suspended Dr. Barsky. Of course, it may be possible that the Regents thought that every doctor who refuses to testify before a congressional committee should be suspended from practice. But so far as we know the suspension may rest on the Board's unproven suspicions that Dr. Barsky had associated with Communists. This latter ground, if the basis of the Regents' action, would indicate that in New York a doctor's right to practice rests on no more than the will of the Regents. This Court, however, said many years ago that 'the nature and theory of our institutions of government . . . do not mean to leave room for the play and action of purely personal and arbitrary power . . . For, the very idea that one man may be compelled to hold his life, or any material right essential to the enjoyment of life, [fol. 23] at the mere will of another, seems in any country where freedom prevails . . .' Yick Wo v. Hopkins, 118 U.S. 356, 369-370 . . . (note) Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment . . .".

Justice Frankfurter, in the *Barsky* case, said: "Of Course, a State must have the widest leeway in dealing with an interest so basic to its well-being as the health of its people. This includes the setting of standards, no mat-

ter how high, for medical practitioners, and the laying down of procedures for enforcement, no matter how strict . . . It is one thing to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession. Implicit in the grant of discretion to a State's medical board is the qualification that it must not exercise its supervisory powers on arbitrary, whimsical or irrational considerations. A license cannot be revoked because a man is redheaded or because he was divorced . . . If a State licensing agency lays bare its arbitrary action . . . that is precisely the kind of State action which the Due Process Clause forbids. See Perkins vs. Elg., 307 U. S. 325, 349-350; also Rex v. Northumberland Compensation Appeal Tribunal (1951), 1 K. B. 711. The limitation against arbitrary [fol. 24] action restricts the power of a State 'no matter by what organ it acts'. Missouri v. Dockery, 191 U. S. 165, 171".

And in the Barsky case, Justice Douglas said: "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered'. It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man . . . The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. And so the question here is not what government must give, but rather what it may not take away. The Bill of Rights prevents a person from being denied employment as a teacher who though a member of a 'subversive' organization is wholly innocent of any unlawful purpose or activity. Wie-

man v. Updegraff, 344 U. S. 183 . . . In this case it is admitted that Dr. Barsky's 'crime' consisted of no more than a justifiable mistake concerning his constitutional rights" (Appearer's 'crime' according to the decision of the Louisiana Supreme Court, was the commission of an act while [fol. 25] insane, and on account of which he was totally irresponsible) "Such conduct is no constitutional ground for taking away a man's right to work . . . Neither the security of the State nor the well-being of her citizens justifies this infringement of fundamental rights."

As stated, appearer Theard with great industry has since 1948 practised his profession, as quoted by the Supreme Court at page 4 of its opinion "without any complaint levelled at his conduct". The Courts in Louisiana have had numerous opportunities during the last six years to observe appearer, both in his private, every-day conduct, and in the discharge of his rather numerous professional pursuits. Attached is a list of the cases he has since 1948 argued in the Louisiana Supreme Court and the Court of Appeal for the Parish of Orleans. This list reflects his capacity to render service in many types of litigation, and demonstrates his complete mental restoration; for trial work both at nisi prius and on appeal is truly taxing and can be performed regularly and constantly over a period of years only by a person like appearer now happily in the possession of a good physique, a sound mind and stable nerves.

Wherefore, the premises considered, appearer Delvaille H. Theard prays that it may please this Court to give consideration to the matters herein set forth; that appearer be permitted to argue his defense orally according to the rules and usages in such matters and to furnish a written Brief if such be deemed necessary; and that, in due course, the Order herein to show cause, of date May 19, 1954, be recalled and rescinded.

[fol. 26] Respectfully submitted,

(S.) Delvaille H. Theard, In Propria persona.

New Orleans, May 29, 1954.

Copy served on George R. Blue, United States Attorney.
(S.) Delvaille H. Theard.

LIST OF CASES ARGUED BY RESPONDENT

Doll v. Dearie et al., Orleans Court of Appeal, 37 So. 2d 61.

Doll v. Dearie et al., Orleans Court of Appeal, 37 So. 2d 608.

Doll v. Meyer, 214 La. 444, 38 So. 2d 69.

State, ex rel. Lucas, v. Hickey, 214 La. 711, 38 So. 2d 395.

Bonnelucq v. Bernard, Orleans Court of Appeal, 39 So. 2d 447.

Doll v. Dearie et al., Orleans Court of Appeal, 39 So. 2d 641.

Fried v. Edmiston, Orleans Court of Appeal, 40 So. 2d 489.

McDaniels v. Doll, Orleans Court of Appeal, 40 So. 2d 530.

Bonnelucq v. Bernard, Orleans Court of Appeal, 41 So. 2d 88.

Doll v. Dearie, Orleans Court of Appeal, 41 So. 2d 84.

Doll v. Sewerage and Water Board of New Orleans, Orleans Court of Appeal, 43 So. 2d 158.

State, ex rel. Warren Realty Company, Inc., v. Montgomery, State Tax Collector, Orleans Court of Appeal, 43 So. 2d 33.

Doll v. R. P. Farnsworth & Co., Inc., Orleans Court of Appeal, 49 So. 2d 354.

Fried v. Edmiston, 218 La. 522, 50 So. 2d 19.

Hardie v. Allen et al., Orleans Court of Appeal, 50 So. 2d 74.

Cresap v. Kilpatrick, Orleans Court of Appeal, 51 So. 2d 130.

Cohen v. Grace, 219 La. 91, 52 So. 2d 297.

[fol. 27] Mayerhefer v. Louisiana Coca Cola Bottling Co., Ltd., 219 La. 320, 52 So. 2d 866.

Alpaugh v. Krajcer, Orleans Court of Appeal, 54 So. 2d 233.

Doll v. R. P. Farnsworth & Co., Orleans Court of Appeal, 55 So. 604.

Brewer v. Cowan, 220 La. 189, 56 So. 2d 149.

Alpaugh v. Krajcer, Orleans Court of Appeal, 57 So. 2d 700.

Doll v. Untz, Orleans Court of Appeal, 57 So. 2d 55.
Doll v. Montgomery, Orleans Court of Appeal, 58 So. 2d 573.
Levenson v. Chancellor et al., Orleans Court of Appeal, 58 So. 2d 839.
Doll v. City of New Orleans, 221 La. 446, 59 So. 2d 449.
Fox v. Doll, 221 La. 427, 59 So. 2d 443.
Doll v. Montgomery, Orleans Court of Appeal, 60 So. 2d 907.
Housing Authority v. Doll, 222 La. 933, 64 So. 2d 224.
State, ex rel. Warren Realty Co., Inc., v. City of New Orleans, 223 La. 719, 66 So. 2d 785.
Doll v. McMorries, Orleans Court of Appeal, 67 So. 2d 750.
Levenson v. Chancellor, Orleans Court of Appeal, 68 So. 2d 116.
Housing Authority of New Orleans v. Doll, 67 So. 2d 522.
City of New Orleans v. Doll, La. So. 2d (not yet reported).
State, ex rel. Warren Realty Company, Inc., Orleans Court of Appeal, S. 2d (not yet reported).
Succession of John Albion Saxton, Orleans Court of Appeal, S. 2d (now pending on application for rehearing).

IN UNITED STATES DISTRICT COURT

HEARING ON RULE FOR DISBARMENT AND ORDER MAKING RULE ABSOLUTE—March 16, 1955

CHRISTENBERRY, J:

Minute Entry

This cause came on this day for hearing on rule for [fols. 28-30] disbarment of Delvaille H. Theard.

Present: Delvaille H. Theard, In proper person; Hepburn Many, Asst. U. S. Attorney; James G. Schillin, Committee on Professional, Ethics and Grievenances.

Benjamin Y. Wolf

After hearing argument of the parties herein, it was ordered by the Court that the rule for disbarment of Del-

vaille H. Theard be and the same is hereby made absolute, and that his name be removed from the roll of attorneys of this Court.

[fol. 31] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS—Filed May 2, 1955

1. A proceeding for disbarment in the federal court cannot be maintained when, as in the present case, it is based exclusively on the decree of a state court, which itself cannot be supported either in law or reason and which, with-
[fol. 32] out substantive due process, deprived the defendan of his property right to practice his profession.

2. The Louisiana Supreme Court had already decided, as to this very defendant (State v. Theard, 212 La. 1022, 34 So. 2d 248) that, since his unfortunate mental breakdown and condition of irresponsibility was a circumstance over which he had no control, it would be unfair to impose on him the penalty to be suffered only by one whose act was intentional and deliberate.

3. Nevertheless, the same Court in disbarring defendant held that it mattered not whether the act complained of stemmed from an inc-pacity to discern between right and wrong or was engendered by a specific criminal intent. Thus, although the Supreme Court had previously held that defendant's insanity was a condition which demanded appropriate consideration, defendant's disbarment was decreed despite his mental irresponsibility, his inability to discern between right and wrong and the fact that the act complained of was neither intentional, deliberate nor willful.

4. Further, since in Louisiana disbarment is statutory (La. Const. Art. 7, Sect. 10) and a lawyer can be disbarred only for willful misconduct (Supreme Court Rules, Rule 13, Sects. 4 and 5), and since obviously an insane person cannot be guilty of willful misconduct, was it proper, just, logical or legal, seventeen years after his illness, when the defendant had regained his health and the full possession of his mental faculties and actively resumed the practice
[fol. 33] and tried forty-seven litigated appeals in the Or-

leans Court of Appeal and the Louisiana Supreme Court without the slightest question or criticism from anyone,—to disbar him in the year 1954 for an act which he committed whilst insane in 1935?

5. A license to practice one of the learned professions constitutes property. To revoke the license of a lawyer, now completely recovered from all mental infirmity, for the sole reason that eighteen years previously he committed an insane act, constitutes an insubstantial and illegal deprivation, without due process, of the lawyer's property right to practice his profession. It exemplifies that indiscriminate classification of innocent with knowing activity condemned by the United States Supreme Court as an assertion of arbitrary power depriving a person arbitrarily and without due process of the right to practice his profession. Robert M. Wieman et al. v. Paul W. Updegraff et al., 344 U.S. 183, 97 L. Ed. 216, 73 Sup. Crt. 215.

6. The disbarment action against defendant was filed in the Louisiana Supreme Court in 1952, seventeen years after the commission of the insane act on January 2, 1935. The defendant pleaded the liberative prescription of ten years (Revised Civil Code of Louisiana, Article 3544), which an earlier Louisiana Supreme Court had referred to as seemingly applicable to actions of disbarment (State v. Fourchy, 106 La. 744, at pages 756, 758; 31 So. 325). The Court referred to defendant's plea, declared that in Louisiana prescription is statutory, refrained from noticing the cited Codal article and the Fourchy decision, and [fols. 34-36] without further discussion of this all-important point, overruled all of defendant's exceptions.

7. It is universally conceded that disbarment is not by way of punishment but is motivated for the protection of the public and to maintain a proper level of professional standards and responsibility. The defendant, undoubtedly subject to insanity and not responsible for his act in 1935, as found and reported by the Master appointed by the Louisiana Supreme Court to hear the testimony in the State disbarment suit, had happily regained his health and was decreed to be fully cured and competent in 1948 by the Judgment (after a full hearing) of the Civil District Court for the Parish of Orleans which thereupon canceled his civil interdiction. From that time (1948) and until the decree

for his disbarment in 1954, defendant's active and irreproachable professional conduct and pursuits have conclusively demonstrated his present complete responsibility and restoration to normal health. It cannot now be claimed seriously or in good faith that, for the purpose of protecting the public, the defendant, who is now in every way competent and responsible, should at the present time be deprived of the right to practice his profession in the Courts of the United States.

(S.) Delvaille H. Theard, pro se.

CERTIFICATE OF SERVICE

[Omitted in Printing]

[fol. 37] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 38] **Proceedings in the United States Court of Appeals for the Fifth Circuit**

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION—December 5, 1956

No. 15584

DELVAILLE THEARD,

versus

UNITED STATES OF AMERICA

On this day this cause was called and, after argument by Delvaille H. Theard, Esq., in propria persona, for appellant, and M. Hepburn Many, Esq., Assistant United States Attorney and James G. Schillin, Esq., for appellee, was submitted to the Court.

[fol. 39] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15584

DELVAILLE H. THEARD, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Louisiana.

OPINION—January 6, 1956

Before HUTCHESON, Chief Judge, and BORAH and BROWN, Circuit Judges.

PER CURIAM: In disbarment proceedings which were had before the Supreme Court of Louisiana, appellant's name was ordered stricken from the roll of attorneys and his license to practice law in Louisiana was cancelled.[1] Thereafter, and by reason of the foregoing, the United States [fol. 40] Attorney filed against appellant in the District Court a rule for disbarment pursuant to Rule 1 (f) of the General Rules of the United States District Court, which, in pertinent part, provides:

> "Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court, he shall be suspended forthwith from practice before this court and, unless upon notice, mailed to him at his last known place of residence, he shows good cause to the contrary within 10 days, there shall be entered an order of disbarment, or of suspension for such time as the court shall fix."

Upon consideration of the motion and the attached certified copy of the opinion and decree of the State Supreme Court the District Judge entered an order suspending the appellant from practice and further ordered that unless

[1] 225 La. 98, 72 So. 2d 310, cert. den. 348 U. S. 823.

appellant show good cause to the contrary within ten days the rule would be made absolute and an order for his disbarment would be entered.

Within the period prescribed appellant filed an answer in which he advanced numerous arguments in support of his basic contention and defense that the opinion and decree of the Louisiana Supreme Court does not present any appropriate or just basis for his disbarment.

The cause came on for hearing on the motion of the U. S. Attorney and appellant's answer and after hearing arguments the District Judge ordered that the rule of disbarment be made absolute and that appellant's name be stricken from the roll of attorneys.

[fol. 41] We are in no doubt that the order of the District Court must be affirmed. Appellant had the burden throughout these proceedings of showing good cause why he should not be disbarred. He offered no evidence and the legal contentions which he urges upon us are not persuasive.

Affirmed.

[fol. 42] In United States Court of Appeals

No. 15584

Delvaille H. Theard,

versus

United States of America

Judgment—January 6, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fols. 43-59] Petition For Rehearing Covering 17 Pages Filed Omitted From this Print. It Was Denied, and Nothing More by Order—January 31, 1956.

[fol. 60] In United States Court of Appeals

[Title omitted]

Order Denying Rehearing.—January 31, 1956

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] Supreme Court of the United States

[Title omitted]

Order Allowing Certiorari.—Filed June 4, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

1956

IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~89~~ 68

DELVAILLE H. THEARD,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION OF DELVAILLE H. THEARD FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DELVAILLE H. THEARD,
Pro Se.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION OF DELVAILLE H. THEARD FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 6, 1956.

CITATION TO OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 228 F. (2d) 617, and will be found in Advance Sheets of February 27, 1956, at page 617, and is printed in Appendix "A" hereto, *infra*, p. 21.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 6, 1956. Rehearing was denied on January 31, 1956. The jurisdiction of this Court is now invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

The Motion of the complainant U. S. Attorney for defendant's disbarment in the federal courts, was based exclusively on the opinion of the Louisiana Supreme Court in *Louisiana State Bar Association v. Theard*, 225 La. 98; 72 So. (2d) 310.

The Federal Court of Appeals, which, beyond said decision of the State Court, had no other alleged complaint or cause of disbarment before it, held, without however expressing its views on any of the questions passed upon by the State Court, that "the legal contentions which he (the defendant) urges upon us are not persuasive". This necessarily involves an evaluation and consideration of the reasons (we submit, mistaken, unsound and unconstitutional) advanced by the State Court and necessarily concurred in by the Circuit Court of Appeals, for the disbarment of defendant:

While the privilege of being received as a member of the legal profession is not a matter of right but depends on the judgment and discretion of the licensing authorities of the State, the **license once granted constitutes property, of which under the Fourteenth Amendment the lawyer cannot be deprived for any arbitrary or insubstantial reason.**

Can a lawyer who, during a complete mental breakdown in 1934 and 1935 committed an act for which he was not legally responsible and the moral import of which he was unable to appreciate, be disbarred in 1954, when he has fully recovered physically and mentally, has again entered normally on the practice of his profession, and has appeared and acted as counsel for some years and on countless occasions in the courts, without the doing of one single act subject to the slightest criticism or reproach?

The right to exercise any calling permitted by law, although perhaps intangible, unquestionably constitutes property, and can only be taken away and denied constitutionally on account of sound and valid justification. Implicit in the grant of discretion to a licensing authority is the qualification that it must not exercise its supervisory powers on arbitrary, whimsical or irrational considerations.

In the present case, **the disbarment** of petitioner, as clearly appears from the decision of the Supreme Court, **was based exclusively on the ground of illness eighteen years previous. The decision, expressly excluding all consideration of personal fault, and indiscriminately classifying innocent with knowing activity, was clearly not based on any ground sufficient or authorized by law, and is lacking in due process.**

Especially in a jurisdiction where, as in Louisiana, the power to disbar is not inherent in the Courts but is strictly statutory and can be grounded only on misconduct,

there must be justification, reasonable and sufficient, for disbarment.

Louisiana State Bar Association v. Connolly, 201 La. 342, at pages 353, 354, 362, 378, 9 So. (2d) 582, at pages 585, 586, 588, 593;

Constitution of Louisiana, Art. 7, Sec. 10;

Article 13, Section 4, of the Articles of Incorporation of the Louisiana State Bar Association, Vol. 21 West Edition, *Louisiana Revised Statutes*, pages 377 and 380.

Further, a petition for disbarment, instituted nearly eighteen years after notorious and wide-spread publicity of the act or acts complained of, lacks due process. *People v. Allison*, 38 Ill. 151; *People v. Coleman*, 210 Ill. 79, 71 N. E. 693; *In the Matter of the Disbarment of C. E. Elliott*, 73 Kansas 151, 84 Pac. 750; *In re Adriaans*, 28 App. D. C. 515; *People v. Tanquery*, 48 Colo. 122, 109 Pac. 260.

STATUTES INVOLVED.

Louisiana Constitution, Art. 7, Sec. 10, Par. 1;

Rules of the Louisiana Supreme Court, Rule 17 (being Article 13 of the Articles of Incorporation of the Louisiana State Bar Association, reproduced in *Louisiana Revised Statutes*, Vol 21, page 377; and particularly Section 4 of said Article 13, at page 380, Vol. 21, *Revised Statutes*, West Publishing Co. Edition).

STATEMENT OF THE CASE.

After some twenty-six years of the due and honorable practice of law, including sixteen years as part-time professor of Civil law in the Tulane Law School at New Orleans*, petitioner about the year 1934 or 1935 suffered a serious mental breakdown resulting from overwork, and which necessitated in 1936 his civil interdiction—appointment of guardian or "committee"—and his removal to a mental hospital where he remained under treatment constantly until 1943, being then moved to the Louisiana State Asylum for the Insane, from which he was released as cured and without psychosis, in 1944.

In 1948, his civil interdiction having been judicially removed—the Court holding that he was completely re-

*The work of petitioner as a part-time professor of civil law (descent and distribution, wills, administration) in the Tulane Law School for sixteen years (from 1919 to 1935) was a valuable contribution rendered by him to his chosen profession, without one cent of pecuniary return. When petitioner's increasingly nervous condition necessitated his resignation in 1935, the measure of his contribution to Tulane and legal education was expressed in a Resolution of the Law Faculty signed by Hon. Rufus Carrollton Harris, then Dean of the Tulane College of Law and since 1937 President of Tulane, in part as follows: "It is with sincere regret . . . that the Faculty tenders this expression of its acknowledgment and deep appreciation of the high quality of the service rendered by Mr. Theard to the institution during the many years of his close connection with it and its affairs, a service characterized at all times by technical and class-room ability of a high order, by a spirit of intense loyalty to the School, and by a disposition which endeared him to students and colleagues alike . . . " And Hon. Paul Brosman, then Assistant Dean of the College of Law (subsequently and until his recent death a Judge of the Military Court of the United States) wrote the petitioner at the time of his resignation: "Never have I known a more loyal and able body of part-time teachers than is found in our practitioner colleagues at Tulane, and among them no one has evidenced more interest in, and devotion to, the School and the cause of modern legal education than yourself . . .".

stored to health and able to manage his own affairs—petitioner, **who had and has never been convicted of any crime,** and whose demeanor in every court has never been subject to the slightest criticism, resumed the practice of law and, since that time and up to the refusal of the rehearing in the disbarment suit on April 26, 1954, was very active in the *nisi prius* and appellate courts—having argued during these six years (from 1948 to 1954) not less than thirty-seven matters before the Supreme Court of Louisiana and the intermediate Court of Appeal for Orleans Parish. See list of these cases, attached to the present petition as Appendix "C", *infra*, pp. 24-26.

In June, 1952, the Louisiana State Bar Association instituted a disbarment suit against petitioner in the State Supreme Court. Complainant admittedly found no fault with defendant's current professional conduct and activities since his resumption of practice in 1948, but based its complaint exclusively on **an act of petitioner committed during his period of insanity approximately eighteen years previous to the institution of the complaint.**

It is must be noted that the State Court, in passing on another act of petitioner of approximately the same date, had already decided that the charge against **petitioner in that matter must be disposed of with regard to his known mental status at that time;** and, accordingly with reference to the act complained of in that case, the Supreme Court **held that it "occurred by reason of an unfortunate circumstance over which (the defendant) had no control", and not "through some intentional and deliberate act on his part."** *State v. Theard*, 212 La. 1022, at p. 1031, 34 So. (2d) 248, at p. 251.

This holding, fully recognizing and adjudging the deficient mental condition, serious illness and lack of responsibility of defendant at and about the times mentioned, is particularly apt in view of the fact that, despite its said finding, the State Court saw fit to inflict disbarment upon petitioner (225 La. 98, 72 So. (2d) 310) for an act which, as previously specifically characterized by the same Court (212 La. 1022, 34 So. (2d) 248), must be held to have "occurred by reason of an unfortunate circumstance (defendant's insanity) over which he had no control", and "not through some intentional and deliberate act on his part."

And the State Court went even further, for in the disbarment decision (although in Louisiana disbarment is strictly statutory and can be considered only on account of an attorney's willful misconduct) the Supreme Court declined to consider any claim of willful misconduct by the defendant as actually charged by the prosecuting Bar Committee (225 La. 98, at page 113, 72 So. 310, at page 315), but declared:

> *"In our opinion it matters not whether the . . . conduct stems from an incapacity to discern between right and wrong, or was engendered by a specific criminal intent."* (Italics by the Court.) 225 La. 98, at page 107; 72 So. (2d) 310, at page 313).

In other words, defendant was disbarred strictly and only because he had suffered, many years previously, (and despite complete recovery) from the illness of mental derangement.

The Court thus refused to consider any charge of willful misconduct as pressed by the prosecuting Bar As-

sociation, but, limiting itself to defendant's conceded insanity at the time of the act complained of, decided that defendant should be disbarred even if he was ill and irresponsible when the act was committed. (The Circuit Court of Appeals must have concurred in this ruling, since it held below that the attack herein on that type of ruling in a disbarment action, is "not persuasive").

Petitioner applied for certiorari directed to the Supreme Court of Louisiana but this was refused. *Theard v. Louisiana State Bar Association*, 348 U. S. 832, 99 L. Ed. 656, 75 Sup. Crt. 54.

In May, 1954, the United States Attorney for the Eastern District of Louisiana, **basing himself exclusively on the decree of the Louisiana Supreme Court,** moved for defendant's disbarment.

Defendant's answer set forth his defense: " . . . the opinion and decree of the Louisiana Supreme Court does not present . . . any appropriate or just basis for his disbarment . . . Appearer was disbarred without just cause or reason and by a decree depriving him of his property without due process of law . . . as clearly appears from a mere reading of the opinion, the Louisiana Court based its decree of disbarment on an act committed while appearer was the victim of a mental breakdown, utterly bereft of reason, and unable to distinguish between right and wrong."

The District Judge, after a hearing, without written reasons and from the Bench ordered that the Rule be made absolute, and that defendant's name be stricken from the roll of attorneys.

On Theard's appeal to the Circuit Court of Appeals for the Fifth Circuit, the Court did not discuss the State Court decision on the numerous points presented in the answer and elaborated in defendant's brief in that Court, but, affirming the District Judge, declared merely: "the legal contentions which he" (the defendant) "urges upon us are not persuasive." 228 F. (2d) 617 (Advance Sheets, February 27, 1956.)

REASONS FOR GRANTING THE WRIT.

A license to practice one of the learned professions constitutes property, and to deprive a lawyer of that property for an alleged reason insubstantial, arbitrary, and unknown in law, violates substantive due process.

Our contention that **the right to practice law is property entitled to protection under substantive due process,** was attempted to be answered by the State Court (225 La. 98, 112, 72 So. (2d) 310, 315) with the quotation of a statement from Corpus Juris Secundum, Volume 7, *verbis* "Attorney and Client", Sect. 4(b), that the right to practice law is a privilege to be earned by hard study, and that **it is not property, and that the lawyer's right to due process exists only to the extent of procedural due process,** *i. e.*, that he should have opportunity for defense when anyone tries to disbar or suspend him from practice.

The Court added that this was its appreciation of the decisions in *Ex Parte Garland*, 4 Wall. 333, 18 L. Ed. 366, and *Ex Parte Robinson*, 19 Wall. 505, 22 L. Ed. 205.

It is to be assumed that the Court of Appeals agrees with this very mistaken and erroneous appreciation of the

law, since the only observation it found it appropriate to make in its decision with reference to defendant's opposition, was all-inclusive and in one phrase: ". . . the legal contentions which he (defendant) urges upon us are not persuasive."

The Supreme Court of Louisiana and the Court of Appeals are indeed very much mistaken in their appreciation of the *Garland and Robinson* cases.

Ex Parte Garland, 4 Wall. (U. S.) 333, at page 378, 18 L. Ed. 366, at page 370, definitely holds that, **when once bestowed, the right to practice law is property and cannot be taken away without substantive due process;** and it follows that **illness twenty years ago cannot be sufficient ground for disbarment,** when the lawyer has now fully and completely recovered and has demonstrated his recovery by great activity in the appellate tribunals of Louisiana and by even greater activity at *nisi prius*,—all this for nearly ten years without a single criticism or complaint from anyone.

The Supreme Court, in *Ex Parte Garland*, 4 Wall. 333, at page 379; 18 L. Ed. 366, at page 370, said:

> "The attorney and counsellor being, by the solemn judicial act of the Court clothed with his office, *does not hold it as a matter of grace and favor.* The right which it confers upon him to appear for suitors and argue causes, is *something more than a mere indulgence revocable at the pleasure of the Court or at the command of the Legislature.* It is a right of which he can only be deprived by judgment of the Court by *moral or professional delinquency.*"

Certainly, a **lawyer, stricken with a mental breakdown, cannot for that reason be characterized as a person guilty of "moral and professional delinquency."**

And in *Ex Parte Robinson*, 19 Wall. 505, at page 512, 22 L. Ed. 205, the Supreme Court in holding that summary disbarment was not the proper remedy for a lawyer's conduct allegedly contemptuous, fully affirmed *Ex Parte Garland.*

The proposition that **the right to practice one's profession is a property right which, like any other property right, cannot be taken away capriciously and without proper, relevant and adequate cause,** is fully stated in *Frank M. Dent v. The State of West Virginia*, 129 U. S. 114, at page 121, 32 L. Ed. 623, at page 625, 9 Sup. Ct. 231, at page 233:

> "It is undoubtedly the right of every citizen of the United States, to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions. . . . All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed the estate acquired in them, that is, *the right to continue their prosecution*, is often of great value to the possessors, and *cannot be arbitrarily taken from them any more than their real or personal property can thus be taken away . . .*"

In *Wieman v. Updegraff*, 344 U. S. 183, 97 L. Ed. 216, 73 Sup. Ct. 215, certain professors in the Oklahoma

Agricultural and Mechanical College were dismissed because they refused to sign a statutory loyalty oath under which they were called upon to swear that they had not within five preceding years been members of any organization officially determined as subversive by the United States Attorney General. The refusal of an official to sign was to be followed by his automatic removal from the public service. **This drastic rule operated without reference to any knowledge on the part of any official at the time, in the nature or objectives of the banned association.** In an action instituted to restrain the payment of salaries to these officials who had declined to sign the oath on the ground that it lacked due process, this Court, reversing the Oklahoma tribunals, said (344 U. S., at page 189, 97 L. Ed. 221, 73 Sup. Ct., at page 218):

> "Knowledge is not a factor under the Oklahoma statute. We are thus brought to the question . . . whether the due process clause permits a State in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership *regardless of their knowledge* concerning the organization to which they had belonged. For under the statute before us, the fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one. *But membership may be innocent. . . . There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds.* In the view of the community, the stain is a deep one, indeed it has become a badge of infamy. . . . *Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath*

offends due process. We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory."

There can be no doubt of the relevancy of the above decision in the present case, where petitioner is sought to be disbarred for an act committed during a period of insanity and without culpability or consciousness. **The "indiscriminate classification of the act of an insane person, whose serious illness and lack of responsibility at the time involved have already been adjudged** by the Court *(State v. Theard,* 225 La. 98, 72 So. (2d) 310), **with knowing and guilty activity justifying disbarment, "must", in the language of this Court, "fall as an assertion of arbitrary power" and "offends due process".**

In the matter of *Dr. Edward A. Barsky v. The Board of Regents of the University of the State of New York*, 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650, the petitioner, a physician, refused to testify and to produce before a Committee of Congress, certain records of an Association of which he was an officer. He was held guilty of contempt, tried in the District Court, and sentenced to a six months prison term, which he served. He was then suspended from practice for six months by the highest medical regulatory board of the State of New York. His appeal to the New York Courts failed, but his application for certiorari was granted by this Court.

The constitutional difficulty in the *Barsky* case, as discerned by three of the Justices, lay in the fact that

Barsky's suspension from the work of his chosen profession was hardly a matter which bore any reasonable relation to the activities, such as they may have been, regarding which Congress had the right to examine him and inspect the papers of his organization.

On the other hand, petitioner Theard, under his conceded insanity on which the decision of the Louisiana Supreme Court is based, has not been guilty of any wrongdoing. Since that Court conceded for the purpose of its decision that he was insane, **he has been disbarred, despite said insanity, because the Louisiana Court held that this admitted insanity offered no defense to any act committed** by him whilst he was *non compos mentis*. It will be remembered **that there can be no mistake** about this, the Louisiana Court having declared unequivocally (225 La. 98, 108, 72 So. (2d) 310, 313) in disbarring him:

> ". . . In our opinion it matters not whether the dishonest act stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent".

Petitioner has found it difficult to believe that the Circuit Court of Appeals could agree with such a doctrine, and yet, one must think that such is the case, as petitioner's earnest protest and argument in that Court are disposed of with the statement that "the legal contentions which he (the present petitioner) urges upon us are not persuasive."

Despite Dr. Barsky's admitted offense, three of the Justices of this Court had no hesitancy in condemning his suspension from his chosen field of work, **which bore**

no relation to the alleged offense before the Congressional Committee, on account of which he had been imprisoned.

Will the Justices who so strongly defended Dr. Barsky's right to practice his profession despite his wrongdoing, be less disposed to recognize the constitutional protection due to the petitioner herein who has surely demonstrated his complete restoration to health and who was disbarred for acts he unwittingly committed without criminal intent during a period of conceded mental infirmity now nearly twenty years ago?

Petitioner must conclude from what Associate Justices Black, Douglas and Frankfurter said in the *Barsky* case, (347 U. S. 442, 98 L. Ed. 829; 74 S. Ct. Rep. 650) that they are unquestionably of the opinion that there must be a relevant and substantial reason for a decree of professional suspension or disbarment, and that **to deprive a physician or a lawyer of his property right to practice his profession, without due and relevant cause, constitutes a deprivation of property without due process of law.**

Justice Black (with Justice Douglas concurring) said, 347 U. S. 459, 98 L. Ed. 843, 74 Sup. Ct. 659:

> ". . . *the right to practice is* . . . a very precious part of the liberty of an individual physician or surgeon. *It may mean more than any property. Such a right is protected from infringement by our Constitution,* which forbids any State to deprive a person of liberty or property without due process of law . . . (p. 463). The very idea that one may be compelled to hold his life or the means of living or any material right essential to the enjoyment of

life, at the mere will of another, seems intolerable in any country where freedom prevails. . . . *Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment. . . .*"

Justice Frankfurter, 347 U. S. 470, 98 L. Ed. 849, 74 Sup. Ct. 665:

"It is one thing to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. *It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession . . .* (p. 471). *The limitation against arbitrary action restricts the power of a State 'no matter by what organ it acts'.*"

And Justice Douglas (with Justice Black concurring) 347 U. S. 472, 98 L. Ed. 850, 74 Sup. Ct. 666, said:

"The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. . . . The great values of freedom are the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellowman. . . . *The Bill of Rights* does not say who shall be doctors or lawyers or policemen. But it *does say that certain rights are protected,* that certain things shall not be done. The Bill of Rights

prevents a person from being denied employment who . . . is wholly innocent of any unlawful purposes or activity. Citing Wieman v. Updegraff, 344 U. S. 183. . . ." (P. 474).

On the basis of these views, since the illness of petitioner was held to be unimportant by the Supreme Court (and by the Court of Appeals which must be held to have coincided in this error), and in view of defendant's disbarment for acts committed whilst he was concededly irresponsible and therefore without reason legal or valid and therefore in violation of due process, we ask this Court to refuse to recognize and follow such a doctrine so definitely criticized and condemned by three members of the Court and unquestionably at variance with the decision in *Wieman v. Updegraff*, 344 U. S. 183, 97 L. Ed. 216, 73 Sup. Ct. 215.

There was no reason and no excuse why, if they believed they should act, the representatives and committees of the Bar Association or Associations in Louisiana should wait from August 1936 until June 16, 1952, to bring their suit against Theard.

When brought finally in 1952, the disbarment suit in respect of a cause of action which it was averred had occurred on January 2, 1935, and which certainly was widely known in the summer of 1936, was prescribed.

In Louisiana, all personal actions, not subject to any prescription specially enumerated in the Civil Code, are subject to the prescription of ten years. R. C. C., Art. 3544.

Since in Louisiana, under the established jurisprudence *(In re Kenner*, 178 La. 774, 152 So. 580), disbarment is essentially a personal action to be disposed of accordingly, it seemed rather clear that, as stated in *State v. Fourchy*, 106 La. 743, 31 So. 325 this disbarment suit, in view of the then long delay of seventeen years, should have been dismissed because of the respondent's plea of prescription. If Article 3544 applies, and the Supreme Court stated in the *Fourchy* decision that it should apply, prescription should have prevailed in this case; prescription, a very direct defense, as stated by the Code (Art. 3459) "a peremptory and **perpetual bar to every species of action, real or personal,** when the creditor has been silent for a certain time without urging his claim".

In not any of the cases that we have been able to find, did the delay in instituting proceedings for disbarment and which the Court disapproved of, even approximate the seventeen (now nearly twenty) years which elapsed in the present case.

Disbarments were refused because of the lapse of time and delay in instituting proceedings, in the following cases:

People v. Coleman, 210 Ill. 79 (thirteen years);
Matter of the Disbarment of C. E. Elliott, 73 *Kansas* 151, 84 Pac. 750 (fourteen years);
People v. Allison, 38 Ill. 151 (seven years).
People v. Tanqueray, 48 Colo. 122, 109 Pac. 260 (eight and a half years);
In re Sherin, 27 S. D. 232, 130 N. W. 761 (several years).

In the case of *In re Adriaans*, 28 App. D. C. 515, the defendant appealed from an order of the Supreme Court of the District of Columbia decreeing his disbarment. The order of disbarment was founded on an offense committed twelve years before. In reversing, the Court of Appeal said:

> "We appreciate the solicitude of the Court concerning the reputation of members of the bar, and should not hinder them in purging the roll of attorneys. The disbarment of Adriaans for misconduct which happened *about twelve years before* is most unusual. The majority of the justices of the Supreme Court who concurred in the order of disbarment appear to appreciate this, for they say under ordinary circumstances the lapse of time would cause the court to seriously consider the long delay in filing the charges . . . The career of an unworthy member of the bar is apt to reveal misconduct more recent than in this case, where the proof is legally insufficient to disbar this respondent on account of an offense alleged to have been committed twelve years ago. The order must be reversed, and it is so ordered".

PREVIOUS APPLICATION FOR CERTIORARI.

The fact that application for certiorari to the Supreme Court of Louisiana was denied (without reasons) October 14, 1954 (Theard v. Louisiana State Bar Association, 348 U. S. 832, 75 Sup. Ct. 54, 99 L. Ed. 656), does not constitute a precedent in respect of the present application for certiorari to the United States Court of Appeals in the present case. *Robertson & Kirkham*, "Juris-

diction of the Supreme Court of the United States (1951), Section 316, pages 603, 604, 605, 610.

CONCLUSION.

It is universally conceded that disbarment is not by way of punishment but is motivated for the protection of the public and to maintain a proper level of professional standards and responsibility. The defendant, undoubtedly subject to insanity and not responsible for his act in 1935, as found and reported by the Master appointed by the Louisiana Supreme Court to hear the testimony in the State disbarment suit, and as adjudged by the Supreme Court itself *(State v. Theard,* 212 La. 1022, at page 1031, 134 So. (2d) 248), had happily regained his health and was decreed to be fully cured and competent in 1948 by the judgment (after a full hearing) of the Civil District (probate) Court for the Parish of Orleans, which thereupon canceled his civil interdiction. From that time (1948) and until the decree for his disbarment in 1954, defendant's active and irreproachable professional conduct and pursuits have conclusively demonstrated his present complete responsibility and restoration to normal health. It cannot now be claimed seriously or in good faith that, for the purpose of protecting the public, the defendant, who is now in every way competent and responsible, should at the present time be deprived of the right to practice his profession in the Courts of the United States.

Respectfully submitted,

DELVAILLE H. THEARD,
Pro Se,
1537 Lesseps Street,
New Orleans 17, Louisiana.

APPENDIX "A"

(Judgment herein of United States Court of Appeals, Fifth Circuit)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,584
DELVAILLE H. THEARD,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 6, 1956)

Before HUTCHESON, Chief Judge, and BORAH and BROWN, Circuit Judges.

PER CURIAM: In disbarment proceedings which were had before the Supreme Court of Louisiana, appellant's name was ordered stricken from the roll of attorneys and his license to practice law in Louisiana was cancelled.[1] Thereafter, and by reason of the foregoing, the

[1] 225 La. 98, 72 So. (2d) 310, cert. den. 348 U. S. 823.

United States Attorney filed against appellant in the District Court a rule for disbarment pursuant to Rule 1 (f) of the General Rules of the United States District Court, which, in pertinent part, provides:

> "Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court, he shall be suspended forthwith from practice before this court and, unless upon notice, mailed to him at his last known place of residence, he shows good cause to the contrary within 10 days, there shall be entered an order of disbarment, or of suspension for such time as the court shall fix."

Upon consideration of the motion and the attached certified copy of the opinion and decree of the State Supreme Court the District Judge entered an order suspending the appellant from practice and further ordered that unless appellant show good cause to the contrary within ten days the rule would be made absolute and an order for his disbarment would be entered.

Within the period prescribed appellant filed an answer in which he advanced numerous arguments in support of his basic contention and defense that the opinion and decree of the Louisiana Supreme Court does not present any appropriate or just basis for his disbarment.

The cause came on for hearing on the motion of the U. S. Attorney and appellant's answer and after hearing arguments the District Judge ordered that the rule of disbarment be made absolute and that appellant's name be stricken from the roll of attorneys.

We are in no doubt that the order of the District Court must be affirmed. Appellant had the burden throughout these proceedings of showing good cause why he should not be disbarred. He offered no evidence and the legal contentions which he urges upon us are not persuasive.

AFFIRMED.

Rehearing refused, January 31, 1956.

APPENDIX "B"

(Judgment of the United States District Court)

JUDGMENT.

Extract from the Minutes of January 6th, 1956.

No. 15,584

DELVAILLE H. THEARD,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "C"

Cases briefed and argued by the defendant (usually as sole counsel), from May, 1948,—when his civil interdiction was removed, until April 26, 1954, when the judgment pronouncing his disbarment (225 La. 98, 72 So. (2d) 310) became final:

Doll v. Meyer, 214 La. 444, 38 So. (2d) 69, December 13, 1948;

State ex rel. Lucas v. Hickey, 214 La. 711, 38 So. (2d) 395, January 10, 1949;

Doll v. Dearie, et al., (Orleans Court of Appeal), 37 So. (2d) 61, October 18, 1948;

Doll v. Dearie, et al., (Orleans Court of Appeal), 37 So. (2d) 608, January 10, 1949;

Bonnelucq v. Bernard (Orleans Court of Appeal), 39 So. (2d) 447, April 11, 1949;

Doll v. Dearie, et al., (Orleans Court of Appeal), 39 So. (2d) 640, March 28, 1949;

Fried v. Edmiston (Orleans Court of Appeal), 40 So. (2d) 489, May 9, 1949;

Mc Daniels v. Doll (Orleans Court of Appeal), 40 So. (2d) 530, May 9, 1949;

Bonnelucq v. Bernard (Orleans Court of Appeal), 41 So. (2d) 88, October 4, 1949;

Doll v. Dearie (Orleans Court of Appeal), 41 So. (2d) 84, October 4, 1949;

Doll v. Sewerage & Water Board of New Orleans (Orleans Court of Appeal), 43 So. (2d) 271, December 12, 1949;

State, ex rel. Doll v. Hickey, Recorder of Mortgages (Orleans Court of Appeal), 43 So. (2d) 158, December 12, 1949;

State, ex rel. Warren Realty Co., Inc., v. Montgomery, State Tax Collector (Orleans Court of Appeal) 43 So. (2d) 33, November 28, 1949.

Doll v. R. P. Farnsworth & Co., Inc. (Orleans Court of Appeal), 49 So. (2d) 354, December 11, 1950;

Fried v. Edmiston, 218 La. 522, 50 So. (2d) 19, January 19, 1951;

Hardie v. Allen, et al., (Orleans Court of Appeal), 50 So. (2d) 74, January 15, 1951;

Cresap v. Kilpatrick (Orleans Court of Appeal) 51 So. (2d) 130, March 12, 1951;

Cohen v. Grace, 219 La. 91, 52 So. (2d) 297, April 23, 1951;

Mayerhefer v. Louisiana Coca-Cola Bottling Co., Ltd., 219 La. 320, 52 So. (2d) 866, May 28, 1951;

Alpaugh v. Kracger (Orleans Court of Appeal), 54 So. (2d) 233, October 2, 1951;

Doll v. R. P. Farnsworth & Co. (Orleans Court of Appeal), 55 So. (2d) 604, January 7, 1952;

Brewer v. Cowan, 220 La. 189, 56 So. (2d) 149, December 10, 1951;

Alpaugh v. Kracger (Orleans Court of Appeal), 57 So. (2d) 700, March 31, 1952;

Doll v. Untz (Orleans Court of Appeal), 57 So. (2d) 55, March 31, 1952;

Doll v. Montgomery (Orleans Court of Appeal), 58 So. (2d) 573, April 28, 1952;

Levenson v. Chancellor, et al., (Orleans Court of Appeal), 58 So. (2d) 839, May 19, 1952;

Doll v. City of New Orleans, 221 La. 446, 59 So. (2d) 449, April 28, 1952;

Fox v. Doll, 221 La. 427, 59 So. (2d) 443, April 28, 1952;

Doll v. Montgomery (on rehearing), (Orleans Court of Appeal), 60 So. (2d) 907, November 3, 1952;

Housing Authority v. Doll, 222 La. 933, 64 So. (2d) 224, March 23, 1953;

State, ex rel. Warren Realty Co., Inc., v. City of New Orleans, 223 La. 719, 66 So. (2d) 785, July 3, 1953;

Doll v. Mc Morries (Orleans Court of Appeal), 67 So. (2d) 750, January 19, 1953;

Levenson v. Chancellor (Orleans Court of Appeal), 68 So. (2d) 116, November 30, 1953;

Housing Authority of New Orleans v. Doll, (Orleans Court of Appeal), 69 So. (2d) 522, January 18, 1954;

City of New Orleans v. Doll, 224 La., 1046, 71 So. (2d) 562, March 29, 1954;

State, ex rel. Warren Realty Co. v. City of New Orleans (Orleans Court of Appeal), 71 So. (2d) 579, April 26, 1954;

Succession of Saxton (Orleans Court of Appeal), 72 So. (2d) 344, April 12, 1954.

SUPREME COURT OF THE UNITED STATES

No. ~~893~~ 69

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

On petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF IN REPLY TO THE SOLICITOR GENERAL.

DELVAILLE H. THEARD,
Pro Se.

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SUPREME COURT OF THE UNITED STATES

No. 893

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

On petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF IN REPLY TO THE SOLICITOR GENERAL.

The fact that the Solicitor General has written a comprehensive Brief in this matter indicates that this case is an unusual and important one.

For years, petitioner has been persecuted by many in New Orleans. They seem unable to appreciate that a lawyer who at one time was very ill, may, as a result of rest, hospitalization and treatment, wholly recover from his illness; and, by his industry, energy and application and by his current irreproachable conduct, be justified in

seeking to recover the position of distinction and intellectual leadership which, as an active practitioner and professor of law, he formerly enjoyed at the bar.

Since the Solicitor General has seen fit to call this Court's attention to the error of the Clerk of the United States Court of Appeals for the Fifth Circuit in the caption in this cause, and since he has declared that the United States has never been a party to this action, it is fair to ask whom the Solicitor General represents.

In any event, the petitioner is very happy that the Solicitor General has appeared in this case.

This is not a case which involves communistic lawyers or any of the other problems, trials and questions rampant at the bar of the United States in these perilous days; but it is a case, important to those who want to see justice done, and further a case without a precedent and absolute unique in its facts and with regard to the sole question presented, namely: Whether it is legal and proper to disbar a lawyer, who is at the present time perfectly well and in all respects qualified, because, twenty years ago, he suffered a mental breakdown from which he has now completely recovered; especially when it will not be denied that for the six years immediately preceding the disbarment decree, this lawyer was in very active practice without a single word of reproach and criticism.

Indeed, the appearance of the Solicitor General may be very helpful, since surely the somewhat unusual circumstance of his active participation herein will focus in a special manner the attention of this Court on the Record

and on the merits of the petitioner whom, twenty years after the fact, these officials want to disbar, not because of any acts he may unwittingly have committed under his then condition of mental infirmity, but strictly and only, despite his complete recovery many years since, because of his said former mental illness.

Petitioner was licensed to practice law in 1910. He was then twenty-two years of age. He was a graduate, with an entirely satisfactory scholastic record, of Tulane Law School, New Orleans. He at once entered upon the practice of law.

In 1916, he became the Editor in Chief of the (Tulane) Southern Law Quarterly (Volumes 1, 2 and 3), which Law Review was stopped by the first world war. When said Journal was resumed as Volume 4 of the Tulane Law Review, petitioner was a member of its Editorial Board, a position which he held until his illness in 1935.

Petitioner, although always engaged in general law practice, was considered to be an expert in real estate law, the settlement of estates, wills, administration.

He was invited to join the faculty of the Tulane Law School as a part-time professor in 1919. This service continued, without interruption, until 1935, when his illness made it necessary for him to withdraw. The thanks of the University (he had served always without remuneration during these sixteen years) were in part reproduced in the annotation at page 1 of his petition for certiorari herein.

Undue application to his duties, both at the law school and particularly in one of the most active law practices in New Orleans, unhappily ended in his mental breakdown in 1934, 1935 and 1936; he was *non compos mentis.*

He was committed to DePaul Sanitarium, New Orleans, (probably the largest Mental Hospital in the South) entering there as a patient on September 2, 1936. He remained confined there until July 1943, when he was moved to the East Louisiana State Hospital (for the insane), at Jackson, Louisiana. There, the improvement in his condition, which had already been observed during the previous two years at De Paul, reached the point where, in February, 1943, he was transferred to the Infirmary at New Orleans. He remained there until February, 1947, when, being completely restored to health, he was released.

Petitioner has never been convicted of any criminal offense.

In 1936, Theard had been civilly interdicted in the Civil District (probate) Court in Orleans Parish. This decree of incapacity was lifted by the judgment of the same Court in May, 1948.

Petitioner at once resumed practice, with notable success. It seems everyone, except certain officials of the State Bar Association and some members of its Committee of Professional Ethics and Grievances, realized that petitioner had been very sick, the victim of serious illness, and by no means a criminal. Many old clients, and some new ones as well, flocked to him, and, being, as even his most implacable professional enemies will concede, a lawyer of considerable experience and always of unremitting indus-

try, he developed, in a few months, a sizeable practice. This is well attested by the fact that, from May, 1948 (when his civil interdiction was lifted) until February, 1954 (when the State Court decree of disbarment became final), petitioner, who at no time had either associates or clerks, prepared and tried thirty-seven appeals in the Court of Appeal for the Parish of Orleans and in the State Supreme Court, in addition to countless cases in the *nisi prius* courts.

The present case is absolutely unique, and a proper case for the issuance of a certiorari, for this reason: Here is a man of good standing, sound mental equipment and conceded diligence in his business, who, nearly twenty years ago, was stricken with a mental and physical breakdown which brought about a condition of complete irresponsibility. As the result of his mental infirmity, he committed some regrettable acts from which it is well known that he derived no personal benefit; he is now a man of exiguous means and no property. When his mental condition became acute and noticeable, he was moved by his wife, parents and friends, to DePaul Sanitarium, as above stated, and later to the other mental institutions mentioned; his total period of hospitalization covering eleven years of uninterrupted confinement and treatment (from 1936 to 1947).

In the State disbarment suit, instituted in 1952, the Commissioner, a well known New Orleans lawyer, who heard the case under appointment of the Supreme Court, reported, (as the Solicitor General notes in his Brief herein) that unquestionably petitioner was suffering, on or about the date of the act or acts complained of, from some type of insanity and was irresponsible.

This Report, of course, was disappointing to the Committee on Professional Ethics, whose members had engineered the disbarment suit for an alleged offense committed by petitioner twenty years previously; and, at the argument and trial before the State Court, the Committee left no stone unturned to secure a decision that the act of Theard, on which the disbarment action was sought, had been willful and felonious.

But the Supreme Court refused to so hold or even to consider that complaint[1]; but, although the same Court had already held[2] that petitioner was insane in 1934 and 1935 at about the time of the commission of the act in question, and that what he had done was due to a condition over which he had no control and for which he should not be treated as a criminal, the Court decided, both in passing on the exceptions to the disbarment[3] and in its final opinion in the matter[4] that he must, in the year *1954*, be disbarred, because in 1935, whilst insane, he had committed, without legal responsibility and unconsciously, this very regrettable but irresponsible act.

This case is unique because there is no other case in the books, where a court, in one decision, absolved the lawyer-defendant from all responsibility because of his mental infirmity releasing him from culpability as a criminal, and by another decision, more or less in the same breath, declared that, because of this insanity and excluding all charges of felonious and willful conduct, it would

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1 Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 310.

2 State v. Theard, 212 La. 1022, 34 So. (2d) 248.

3 Louisiana State Bar Association v. Theard, 222 La. 328, 62 So. (2d) 501.

4 See Note 1.

nevertheless disbar the lawyer solely on account of his said insanity; all this despite the complete recovery of the lawyer at the time of the decision and for some seven years previously.

The statement at page 10 of the Brief of the Solicitor General that, according to the accepted rule, disbarment may be based on acts committed during insanity, is not supported by the decisions which he cites. In the *Patlak* case, 368 Ill. 547, the Court was not satisfied with the evidence of respondent's insanity. Here are its very words:

> "The testimony is conflicting as to whether Patlak was sane or insane on the respective dates he had the transactions with the five named complainants. . . ."

Contrary to the purpose for which cited, the Pennsylvania Court declared in the *Kennedy* case, 178 Pa. 232, 35 Atl. 995, that, if it were satisfied by the evidence that the respondent was of such unsoundness of mind as to be actually insane and to render him unable to have known the difference between right and wrong, it might feel inclined to follow the argument of his counsel. But the Court found the evidence insufficient to establish respondent's insanity. In the case now before this Court, the insanity of the petitioner is established by the judgment of the same State Court which ordered his disbarment for that reason exclusively.

In the *Manahan* case, 186 Minn. 98, 242 N. W. 548, respondent was afflicted with a painful dermatitis of the hand and feet brought about by a nervous condition. The referee found that respondent was fully capable of

distinguishing between right and wrong and of appreciating the consequences of his acts. The Minnesota Court did not say that it would disbar an attorney for acts committed whilst insane.

In the *Fitzgibbons* case, 182 Minn. 373, 234 N. W. 637, the Minnesota Court held that respondent's mental powers had not been affected by an operation which left him subject to attacks of epileptiform and periodic nervous disturbances. Again, the Court did not say that it would disbar the attorney even if it had found (which it did not) that this mental condition had affected his capacity to distinguish right from wrong.

In re Nicolini (N. Y.), 262 Appellate Division Reports, 114, a psychiatrist, in response to a hypothetical question, "thought" that due to domestic troubles between the defendant and his wife, he was under a "tremendous emotional upheaval" during the time in question. The Court held that defense was insufficient.

In re Vincent (Ky.), 282 S. W. (2d) 335, a case of suspension. The Court considered "some physical and mental disturbance" and considered same insufficient.

In re Bivona (N. Y.), 261 Appellate Division Reports, 221, 222, the defendant suffered from epileptic amnesia, but the Court said: "There is no evidence, however, that the acts complained of resulted from such a condition."

In re Creamer, 201 Oregon 343, 270 P. (2d) 159, the Court approved a finding of professional misconduct, but stated that the record showed that, at the time defend-

ant committed the acts he was suffering from a mental disorder. The Court held (in a decree closely applying to the issues now before this court) that, on showing of patient's recovery, he might be reinstated.

That was a whimsical and unsound decision depriving petitioner of his property right to practice his profession, and utterly violative of the fundamental precepts of the Fourteenth Amendment.

No one doubts petitioner's complete recovery at the present time and ever since his interdiction was lifted by court decree in 1948. The numerous law cases that he has tried since that 1948 decree and his personal preparation for and individual management of the defense to the present disbarment action in the Federal District Court, the Court of Appeals and in this Court, demonstrate that he possesses, at the minimum, the qualifications of a competent lawyer. Alone in this case, he has written all the pleadings and the Briefs. He personally argued the case before the District Judge and in the Circuit Court of Appeals. Everything that has been done in the present case, including the present Reply to the Solicitor General, is the work of petitioner alone.

The presence and active participation in this cause of the Solicitor General suggests that the fair and proper way to go into and adequately dispose of this case would be by the granting of the prayer for certiorari. Due to his manifest interest in this matter, the Solicitor General no doubt would welcome such a ruling; and the petitioner, who has every intention of continuing to handle this matter personally, feels that, if he were afforded the oppor-

tunity of appearing before this Court and presenting his qualifications and orally arguing his case for the reversal of the federal decree of disbarment, he would be able to make an impression which, he earnestly believes, would be convincing and favorable.

The Louisiana decision to disbar petitioner, it is submitted, was particularly a mistaken one, based as it was exclusively on insanity, particularly and specifically excluding all consideration by the Court of any alleged charge of misconduct.[5]

In Louisiana, disbarment does not depend, as it does in every other State and also in the federal courts, on the appreciation by the Court of all grounds urged to justify a decree removing a lawyer from the list of his brethren. Disbarment is not in Louisiana a matter lying entirely in the discretion of the Judges. It is a Constitutional matter. One may be disbarred only for misconduct, and not for anything else.[6] The Louisiana Judges are of course bound by this Constitutional provision; and it has been widely considered that the decree of the State Supreme Court disbarring petitioner on the ground of illness and excluding all consideration of alleged misconduct, was particularly weak, illegal and in direct violation of the State fundamental law and inevitably of substantive due process.

The Solicitor General has misconceived the petitioner's position in the present case. He is mistaken

[5] In Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 310, the Louisiana Supreme Court said: "In our opinion, it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent".

when he says that the United States Court must use the State disbarment decree as its cause of action for disbarment in the Federal Court. That the United States Attorney happened to do this in the present case, merely indicated his belief that the State decree was, in his opinion, sufficient.

One thing appears to be certain: If the United States Attorney, as in the present case, chose to use the State Court decree as a basis for his action of disbarment in the federal court, inquiry into the validity of said State Court decree was open to any objection, to the same extent that any other alleged reason for disbarment would have been subject to any defensive attack.

It is somewhat unfair for the Solicitor General to say that, in the situation of the present case, the petitioner, in his attack on the State Court decree which the United States Attorney saw fit to present as his sole cause for disbarment, "seeks to utilize the federal court (suit) as a vehicle for obtaining another review, albeit collateral, of the State Court order."

Be it remembered that it was the United States Attorney who selected said State decree as the justifica-

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[6] Louisiana Constitution of 1921, Article VII, Section 10: "It (the Supreme Court) shall have exclusive original jurisdiction in all disbarment cases involving misconduct of members of the bar with power to suspend or disbar under such rules as may be adopted by the Court. . . ." The Articles of Incorporation of the Louisiana State Bar Association are, by order of the Supreme Court of date March 12, 1941, made the rules of the Court by which the Association is governed. In re Jones, 202 La. 729, 12 So. (2d) 795, 796. Section 4 of Article 13 of said Charter and Rule of Court that disbarment can only be based on a "**willful** violation of any rule of professional ethics. . . .". See said Charter reproduced in Volume 21 of West's L. S. A. Revised Statutes of Louisiana, page 380.

tion and sole cause of action for the attempted disbarment in the federal court, and that, by order of the District Court, the petitioner was called upon to show cause why the relief selected and prayed for by the United States Attorney should not be granted.

It can not be said, under familiar principles, that the previous denial in this Court of the petition for certiorari to the State Court, is a cause for denying the present application.[7] If it was so, it was totally unnecessary for the Solicitor General to do anything in the present case, except to ask the Court to apply such rule.

The forces that obtained Theard's disbarment in the State Court and the influences and officials that are now seeking the same relief in the federal court for an act *twenty years old* performed during a period of non-responsibility due to illness (from which happily a complete recovery has been effected), perpetrated an act of monumental injustice and a violation of law and a deprivation of *petitioner's property right to practice his profession.* Is it to avoid an investigation of the so-called merits of such a proceeding in this Court, that the Solicitor General pleads or suggests some kind of *res judicata*; urging that the State Court decree should be accepted here under some rule of comity which really does not exist, thus preventing a full consideration of such an important matter in a tribunal free from local influences and prejudices?

We think it is well settled that there is no justification for the position that said previous denial of certiorari to the State Court warrants a similar denial in the federal

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[7] Robertson & Kirkham, "Jurisdiction of the Supreme Court" (1951), Sec. 316, pages 603, 604, 605, 610.

case against petitioner,[8] it being significant that in the latter case the Solicitor General feels it his duty to appear and offer his objections in a full discussion of what he conceives to be the merits of the instant case.

It is submitted that it is impossible to justify as correct a State decree of disbarment on the ground of insanity only, when the act complained of happened twenty years ago, and the petitioner having fully recovered his health after *eleven years* of hospitalization, practiced his profession, very actively and without one word of criticism of his conduct, for nearly *seven years* before the instituting of the disbarment proceedings.

To use illness twenty years old and from which there has been complete recovery is not a sound, fair and reasonable reason for depriving a lawyer of the *property right* to practice his profession.

And, of course, this inevitably brings up the question of *property right—want of due process—substantive due process*,—of which petitioner has been deprived by the decree of the District Court and the Circuit Court of Appeals; to the same extent that his said property right was taken away from him by the judgment of the State Court.

The whole case both in the State Court and in the Federal Court shows that petitioner never complained of any lack of opportunity to defend himself,—procedural due process. It is not correct for the Solicitor General to pretend that such is now petitioner's complaint.

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[8] Ex parte Tillinghast, 4 Pet. 108, 7 L. Ed. 798; Selling v. Radford, 243 U. S. 46, 61 L. Ed. 585, 37 Sup. Ct. 377; Thatcher v. United States, 6th Cir., 212 Fed. 801, 129 C. C. A. 225.

The excerpt from *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552, quoted at page 10 of the brief of the Solicitor General, *concedes that an attorney's calling or profession is his property*, and merely holds, that, if so provided by the Court Rules, disbarment proceedings may be conducted summarily and by Rule, such procedural due process, as petitioner freely admits, is sufficient.

Anyone who has to any extent familiarized himself with the papers herein, must know that petitioner's special complaint has always been that the State Court fell into serious error, when it declared that *Ex Parte Garland*[9] merely assured procedural due process to a lawyer sought to be disbarred. That decision on the contrary particularly holds that sound, substantive and compelling reasons must exist to deprive a lawyer of his *property right to practice.*

Petitioner's appeals and petitions for review both in the State Court and in the Federal Court disbarment proceedings, have, at all times, particularly emphasized that he was being disbarred for a whimsical, arbitrary reason, unquestionably constituting want of substantive due process. Petitioner complains, and has always complained, that there must be just grounds and adequate reasons for depriving a lawyer of his *property right* to practice his profession; and that, under the Fourteenth Amendment, this right cannot be taken away without just and due cause.

We think the Solicitor General avoids this question, when, instead of discussing it and undertaking to meet and answer it as exhaustively covered in the petition for

[9] Ex parte Wall, 4 Wall. 333, 18 L. Ed. 366.

certiorari herein, he chooses to direct his attention to a question of procedural due process which clearly forms no part of the present case.

Our thesis is that, where a man of previous irreproachable conduct and standing at the bar as an active practitioner for then nearly thirty years, becomes ill and suffers a *nervous breakdown*, and during said period of breakdown is involved in acts which are subject to criticism, but which according to a well considered opinion of the Supreme Court[10] show that he was insane at the time and should not in reference thereto be treated as a criminal; and when that man is treated and hospitalized for this condition for eleven years but regains his health completely in 1948, his civil interdiction being lifted by court decree; whereupon he resumes practice and thereafter practices for *six years* without one word of criticism of his conduct, personal or professional, and during these six years (1948 to 1954) tries 37 contested cases in the appellate courts and countless cases in the lower tribunals,—it is submitted that his disbarment merely for the reason that he suffered from this condition of illness more than twenty years before, deprives him of his *property right* to practice his profession without adequate cause, illegally, and in violation of Due Process, contrary to the Fourteenth Amendment and the principles enunciated by this Court in *Ex Parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Wieman v. Updegraff*, 344 U. S. 187, 97 L. Ed. 216, 73 Sup. Ct. 215, and the dissenting opinions of Associate Justices Black, Douglas and Frankfurter in *Barsky v. Board of Regents*, 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650.

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[10] See Note 2.

As Justice Douglas (with Justice Black concurring) said in the *Barsky* case, 347 U. S. at page 472, 98 L. Ed. at page 850, 74 Sup. Ct. at page 666:

> "The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. The Bill of Rights prevents a person from being denied employment who . . . is wholly innocent of any unlawful purpose or action. Citing Wieman v. Updegraff, 344 U. S. 183 . . . In this case it is admitted that Dr. Barsky's crime consisted of no more than a justifiable mistake concerning his constitutional rights".

In the case now before this Court, petitioner's "crime", which occurred more than *twenty years ago*, consisted of no more than becoming subject to a serious mental breakdown from which, after eleven years (1936 to 1947) of hospitalization, treatment and care, he completely recovered, so that, when he was disbarred in 1954, he had been in very active law practice, without one word of criticism or complaint, for over seven years.

As said by this Court in *Wieman v. Updegraff*, 344 U. S. 187, 97 L. Ed. 216, 73 Sup. Ct. 215:

> "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminating".

It is submitted, although there have been in the State Courts other cases of disbarment involving defenses of insanity, that not one of them even remotely resembled the present case. There was in every such case always a doubt about the insanity. Here, the State Court in a separate case[11] solemnly adjudged the insanity of petitioner, and held that the acts of petitioner must be considered accordingly, as they were due to a condition over which petitioner had no control and for which he was not responsible.[12]

In no other insanity disbarment case, had the lawyer sought to be disbarred, been hospitalized and treated for *eleven years* on account of his illness.

In no other such case also, was the prosecution for disbarment instituted nearly *eighteen years* after the act and six years after the lawyer had actively resumed successfully and without the slightest criticism the practice of law, those years of great professional activity and service having demonstrated his complete recovery from the pre-existing illness.

To say that such a person, despite all the admitted conditions and circumstances which demonstrate the contrary, is a menace who should be disbarred for the public good, is to deprive petitioner of his **property** for a reason arbitrary, whimsical, not founded in fact, unreasonable and violative of substantive due process guaranteed by the Fourteenth Amendment.

> "To disbar an attorney is to inflict upon him a punishment of the severest character. He is

[11] See Note 2.

[12] See Note 2.

admitted to the bar only after years of study. . . . Surely, the tremendous power of inflicting such a punishment should never be permitted to be exercised, unless absolutely necessary to protect the Court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession."

Respectfully,

DELVAILLE H. THEARD,
Pro Se.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

OPPOSITION OF PETITIONER TO THE APPLICATION OF THE ACTING SOLICITOR GENERAL FOR PERMISSION TO BE GRANTED TO THE LOUISIANA STATE BAR ASSOCIATION TO FILE A BRIEF AND MAKE AN ORAL ARGUMENT HEREIN.

DELVAILLE H. THEARD,

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OPPOSITION OF PETITIONER TO THE APPLICATION OF THE ACTING SOLICITOR GENERAL FOR PERMISSION TO BE GRANTED TO THE LOUISIANA STATE BAR ASSOCIATION TO FILE A BRIEF AND MAKE AN ORAL ARGUMENT HEREIN.

The petitioner respectfully but earnestly opposes the request of the Acting Solicitor General, that the Louisiana State Bar Association be permitted to submit a brief and make an oral argument in this case.

If petitioner believed that the Bar Association, if allowed to intervene, would fairly limit its argument to the issues included in the present record, petitioner would have much less objection.

But, as we will show, ever since the chief argument and complaint of the Bar Association against petitioner was not considered, but on the contrary was definitely excluded from the decision and opinion of the Louisiana Supreme Court, every step of the Bar Association has been motivated only by its desire to get some other tribunal to include and act on the charge of alleged personal fault, which the Louisiana Supreme Court had refused to consider.

In addition, there are serious technical reasons why, as we believe, the Bar Association lacks capacity to gain this Court's permission to enter into this case.

I.

The Solicitor General has already filed a complete brief in this matter and he and his staff were and are entirely informed as to the sole issue presented by the present petition,—whether the disbarment of an attorney, based exclusively on the ground of mental illness eighteen years previous,—the disbarment decision expressly excluding all consideration of personal fault or willful misconduct—constitutes (when the attorney has, concededly, fully regained his health and has already for many years been restored to active and honorable law practice) a deprivation of the attorney's property right to practice his profession without substantive due process.

The Solicitor General has already fully presented his argument on this point in his brief on file; and his request that the Grievance Committee be now allowed to enter into the case can only reflect either his own personal preference or else the pressure of a few members

of the said Grievance Committee, and certainly cannot be the result of any real necessity for any such intervention.

The Committee has shown an animus against the petitioner in this case, both in the Louisiana Supreme Court and in the federal courts, that is not easily explained. However, it is believed that the explanation lies in the fact that the Committee, due to the limited decree of the State Supreme Court, which disbars petitioner on the ground of mental illness eighteen years previous and on nothing else, has failed to maintain any serious cause of action for disbarment against petitioner.

In its original complaint against petitioner, the Committee charged willful misconduct as its alleged cause for disbarment. When the State Court refused to consider this charge and limited its decision against petitioner to a decree excluding all questions of personal or professional fault, and handed down a disbarment on the exclusive ground of mental illness eighteen years before, this was a rude shock to the experienced lawyers who make up the Committee, and since that time the Committee has done its utmost to intervene in one proceeding after another, in the hope of ultimately securing a decree or at least an expression from some tribunal, which would at least imply or suggest actionable misconduct on the part of petitioner.

They have followed this course incessantly, because they well realized how shaky, uncertain and, as we think, definitely unconstitutional, was the decree of petitioner's disbarment, based merely on illness (especially when rendered in a jurisdiction where, under the State Constitution, the sole ground for disbarment is willful misconduct).

And so, the Committee is now at the door of this Court, hoping, although there is no charge and not one word of misconduct in this record, and nothing in the record to support their original averments, that, in some way, they may be able to enlarge the issues and, despite the fact that petitioner was ill, not conscious of his acts and irresponsible, they may, in some miraculous way, get this tribunal to adopt their original misconduct charge, although the record is made up only of the State disbarment decree itself, which excluded misconduct.

This is the third time the Committee has attempted this technique in the present proceeding. The District Court, Hon. Herbert W. Christenberry, would not allow the Committee to remain in the case into which they had come without permission, but permitted Mr. Schillin to make an oral argument as an individual, with the distinct understanding and ruling, however, that he would not be considered as a party.

In the Circuit Court of Appeals, without even worrying to obtain the Court's permission or consent, the Committee printed its name and that of its Chairman on the cover of the brief of the United States Attorney. This was protested at the hearing, and the Chief Judge indicated marked astonishment at the presence of the Committee in the case.

II.

The technical objections to the appearance of the Grievance Committee here, are of the utmost seriousness:

The Grievance Committee (if constitutionally organized—which we doubt very much) cannot go beyond

the Charter under which it was organized and which is the raison d'être of its existence.

The Charter of the Louisiana State Bar Association is reproduced in Louisiana Revised Statutes of 1950, West LSA Edition, Vol. 21, pages 349 to 403.

The subject "Discipline and Disbarment of Members" is in Article 13, Sections 1 to 9 (pages 377 to 389). The Committee investigates charges of professional misconduct, and, in its sole discretion, institutes disbarment action in what it considers to be proper instances. Its decision that, in its opinion, no action is justified in any case, is not subject to any control or supervision whatever. When it decides that suit is needed, the Charter (Article 13, Section 4, p. 380, Vol. 21, Revised Statutes) specifically states that the duty of the Committee is discharged by an action "in the Supreme Court" (of Louisiana). Nowhere do we find that the Committee is authorized to act, or make appearance, or prosecute in any other Court.

Therefore, we would feel (even if this Committee was organized under valid Louisiana law), that it would have no right to intervene and prosecute in any Court other than the Supreme Court of Louisiana. But is the Committee validly and legally organized? This brings us to the third point of this opposition.

III.

In Louisiana, disbarment is wholly and exclusively within the power and jurisdiction of the State Supreme Court, under a special grant of original jurisdiction.

Louisiana Constitution, Article VII, Section 10:

> "It (the Supreme Court) shall have exclusive original jurisdiction in all disbarment cases involving misconduct of members of the bar, with the power to suspend or disbar under such rules as may be adopted by the Court. . . ."

As shown, the Court may make Rules to carry this grant of power into effect.

Article 13 of the Charter of the State Bar Association (Louisiana Revised Statutes, Vol. 21, pages 377 to 389) is a Rule of the Supreme Court, made so by the Order of the Court. (See text of Order, at page 353 of said Volume 21).

We concede, of course, that the Court may select deputies and constitute committees to attend to the details in disbarment matters. As seen, it may make "such rules as may be adopted by the Court".

But we must remember that, even the integrated bar of the State of Louisiana enjoys no legislative superiority over the State Constitution.

Under that Constitution, only the Supreme Court,—no other agency or unit of State government,—can control and direct "all disbarment cases".

It necessarily follows that the members of this Grievance and Ethics Committee, which is to exercise plenary powers over all investigations, all prosecutions, or all conclusions not to prosecute, in any given case involving professional misconduct, must be appointed by the Supreme

Court. Only the Supreme Court itself can delegate its constitutional authority to persons who are going to act for it. No other agency can do so or in any way control the power or discretion of the Court in that regard. It is the responsibility of the Court itself, which it cannot share with anyone else, and which no one else can assume; particularly, no one else can control the Court in the execution of the grave responsibility of seeking a personnel for its Grievance and Ethics Committee.

It is submitted that the Charter of the State Bar Association definitely violates this basic rule; for it declares, clearly and specifically, that the members of this Committee shall, and can only, be appointed and selected by the Supreme Court "on the recommendation of the Board of Governors" of the association. See Article 13, Section 1; Revised Statutes, Vol. 26, p. 377. If the Court can only appoint members of this Committee who are recommended by the Board of Governors, it is perfectly clear that the Court can appoint only such members as have Association approval, and that the Board of Governors, if it will not recommend a certain individual, makes it impossible for the Court to appoint that person, no matter how earnestly the Court may wish to do so. Obviously, when the Constitution gives absolute power to the Court to control disbarment and to make rules and to appoint deputies and representatives, it is clear that the Court has been shorn of its Constitutional power, when it can only make an appointment which is satisfactory to and has the recommendation of someone else.

And further, unless the Bar Association is willing, the Supreme Court can do nothing about this emasculation of its Constitutional prerogative.

The Court can do nothing even to change this Rule. The rule can be changed only by the Board of Governors of the Association. Article 15 of the Charter of the Association (Volume 21, page 403) provides unmistakably that the

> ". . . articles of Incorporation, except Articles 12 and 13, may be amended by a majority vote . . . . Articles 12 and 13 can be amended only by a vote of the Board of Governors, approved by the Supreme Court".

This Article 13 which can only be changed when the Bar Association Board of Governors is willing to change it, is the Section now under consideration.

Before the Supreme Court can change the rule which unconstitutionally limits its powers of appointment, or with reference to the subject of disbarment within its exclusive prerogative under the Constitution, the Board of Governors must permit the Court to do this.

———o———

A Committee, organized under such dubious Constitutional ægis and whose right to act even in the State of Louisiana is so beset with serious doubt, does not speak with any authority for anyone. It cannot properly replace the Solicitor General in the discharge of his functions as representative of the Department of Justice in litigated matters in this Court.

The Acting Solicitor General, doubtless because of his lack of information on the structure and validity of the quoted Articles of said Charter and of the Louisiana

Constitution, was therefore mistaken when he urged, in his recent Application and Memorandum, that this Grievance Committee represents validly and legally probably eighty per cent of the lawyers practicing in the federal districts in Louisiana. In point of fact, the Committee represents no one, and can add nothing to the discussion in this Court, except a discussion as to its constitutional infirmity and an involvement of this Court into the discussion of a local question which the petitioner himself had not raised until the Committee itself, with the acquiescence and under the sponsorship of the Acting Solicitor General, apparently concluded that it would come into this jurisdiction to supersede the regular officers and representatives of the Government of the United States and of the Department of Justice in this type of case.

It is submitted that the application of the Acting Solicitor General herein should not be granted.

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Finally, how can this Committee or anyone else undertake to foster and promote a disbarment exclusively grounded, not on personal or professional dereliction, but exclusively on previous mental illness, when the very Constitutional Article which invested the State Supreme Court with jurisdiction in such matters only permitted disbarment in Louisiana for willful misconduct. How can anyone seriously and in good faith maintain that the disbarment of a lawyer by a State Court judgment based only on mental illness eighteen years ago and specifically excluding all claims of personal fault or professional misconduct, present a case of willful misconduct as to which

alone this Committee, even if we admit its legal qualifications and rights, is permitted to act in any disbarment proceeding in Louisiana.

Respectfully submitted,

DELVAILLE H. THEARD,
Petitioner,
Pro Se.

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing opposition were served on the Acting Solicitor General of the United States, by depositing same in the mail, duly addressed, prepaid, on this 10th day of August, 1956.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

On Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF DELVAILLE H. THEARD, PETITIONER.

DELVAILLE H. THEARD,
Pro Se.

SUBJECT INDEX
AND
ANALYSIS OF PETITIONER'S ARGUMENT.

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The disbarment decree herein depends wholly on a Louisiana Supreme Court decision, which, in disbarring petitioner on the ground of illness only, lacked jurisdiction *ratione materiae*, violated the State Constitution, and deprived petitioner of his property right to practice his profession without due process of law.

(1)

Under the State Constitution, disbarment in Louisiana is limited to acts of misconduct. Illness is not a ground. Nevertheless, excluding all other considerations and refusing to consider charges made by the prosecuting Bar Association, the State Court, conceding petitioner's insanity, decreed petitioner's disbarment and held that it mattered not that, due to illness, petitioner could not discern between right and wrong and was irresponsible at the time of the commission of the acts complained of. This decision was rendered nineteen years after the acts complained of, when after this long period of time and more than ten years of treatment and hospitalization of petitioner in mental institutions, no one could question petitioner's complete recovery in body and mind, and when petitioner, within the six years immediately preceding the disbarment decree, had returned to very active law practice and had argued thirty-seven cases in the appellate courts of the State, without one word of criticism or question from anyone. Delvaille H. Theard v. United States of America, 228 Fed.

(2d) 617. Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. (2d) 310. Louisiana Constitution (1921), Art. 10, Sect. 7. Louisiana State Bar Association v. Connolly, 201 La. 342, 9 So. (2d) 582 8

(2).

The State disbarment decision (on which the present federal proceeding is based exclusively) was particularly regrettable and difficult to understand, since the same State Court, in a previous case involving the mental illness of petitioner herein, had already decided that petitioner's acts at the time in question must be considered and weighed in the light of the fact that these acts had "occurred by reason of an unfortunate circumstance" (petitioner's illness) "over which he had no control" and "not through some intentional and deliberate act on his part". State v. Theard, 212 La. 1022, 34 So. (2d) 248 13

(3)

Not one other decision has been found in which a person whose mental irresponsibility was conceded by the Court, has been disbarred for that reason. The decisions cited by our opponents all show either that the mental affliction was controverted or doubted, or that the lawyer was suffering from a physical ailment which in no manner affected his mind or his accountability for the acts complained of. Here, the State Court, whose decision was followed in every respect by the District Court and the Circuit Court of Appeals. conceded petitioner's insanity and irresponsibility at the time of the acts complained of, and disbarred petitioner for that reason only 15

(4)

Petitioner's right to practice his profession is property protected by the Federal Constitution and of which he can not be deprived without proper, relevant and adequate cause as in the case of any other property. To disbar

petitioner on the sole ground of illness many years previous and because of acts which the Court had already decided occurred by reason of his unfortunate illness over which he had no control, constitutes, especially now that he has demonstrated his complete recovery, an unsound, arbitrary and whimsical reason, depriving petitioner of his property without due process, in violation of the Fourteenth Amendment. Frank M. Dent v. The State of West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 S. Crt. 231. *Ex Parte* Garland, 4 Wall. 333, 18 L. Ed. 366. *Ex Parte* Robinson, 19 Wall. 505, 22 L. Ed. 205 18

(5)

In matters of employment and of the right of a citizen to pursue his chosen occupation, as decided by this Court in Wieman v. Updegraff, 344 U. S. 183, 97 L. Ed. 26, 73 S. Ct. 215, "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power, and offends due process". The acts of a concededly insane person are innocent and connote neither criminality nor wrongdoing. Does the due process clause permit a Court to disbar a lawyer solely on the ground of illness, for acts performed during a period of mental infirmity and mental breakdown, without regard to the absence of any criminal intent? "It is sufficient to say that constitutional protection does extend to the . . . servant whose exclusion . . . is patently arbitrary and discriminatory (344 U. S. at page 192)". 22

(6)

The important case of Dr. Barsky, 347 U. S. 442, 98 L. Ed. 829, 74 S. Crt., 650 25

(7)

Particularly, the extremely pertinent dissents in the Barsky case, by:

Associate Justice Black (with Associate Justice Douglas concurring) 27

Associate Justice Frankfurter 28
Associate Justice Douglas (with Associate Justice Black concurring) 28

(8)

It is universally conceded that disbarment is not by way of punishment but is motivated for the public good. Since it is believed that our opponents will not deny that petitioner has, for at least ten years, happily regained his health, physical and mental, it can not now be claimed seriously or in good faith that, for the purpose of protecting the public, petitioner, who is now in every way competent and responsible, should at the present time be deprived of the right to practice his profession in the Courts of the United States 30

(9)

The inexcusably long delay in filing, on June 16, 1952, the suit for disbarment in the State Court, on account of an act allegedly committed on January 2, 1935; the fact that the action, when finally instituted, was barred by limitation under the Louisiana statute; the failure of the State Court to decide this all-important issue, despite petitioner's appropriate plea, the petitioner thus being deprived of due process under the law of the State. Louisiana Revised Civil Code. Articles 3544, 3459, 3528 and 3530. Louisiana Code of Practice, Articles 115 and 964 (Act 308 of 1910). In re Kenner, 178 La. 774, 152 So. 580. 31

(10)

Decisions from other States hold, without any exception, that we have been able to find, that it has always been the policy of the Courts to discourage and refuse to consider stale and prescribed claims for disbarment. 35

(11)

The fact that an application for certiorari to the Louisiana Supreme Court in reference to the disbarment of petitioner was denied without comment in this Court, Theard v. Louisiana

State Bar Association, 348 U. S. 832, 99 L. Ed. . . . , 75 S. Crt. 54, does not, under the established jurisprudence on this subject, constitute a precedent on any issue raised in the present petition and Brief. Robertson & Kirkham, "Jurisdiction of the Supreme Court of the United States" (1951), pages 603, 604, 605 and 610. 40

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

On Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF DELVAILLE H. THEARD, PETITIONER.

REPORT OF DECISION BELOW.

Delvaille H. Theard v. United States of America, decided January 6, 1956, reported in 228 Fed. (2d) 617 (Tr. p. 24). Rehearing denied (without opinion), January 31, 1956 (Tr. p. 26).

GROUNDS OF JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1), and Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

STATUTES INVOLVED.

Title 28, Section 1254 (1), United States Code (see Appendix, page 43). Section 1 of the Fourteenth Amendment to the Constitution of the United States of America. (See Appendix, page 43).

Constitution of Louisiana (1921), Article VII, Section 10. (See Appendix, page 43).

Rules of the Louisiana Supreme Court (Charter of Louisiana State Bar Association, Article 13, Section 4). (See Appendix, page 44).

Revised Civil Code of Louisiana, Articles 3544, 3459, 3528 and 3530. (See Appendix, page 45).

Louisiana Code of Practice, Articles 115 and 964. (See Appendix, page 46).

QUESTIONS PRESENTED FOR REVIEW.

1.

Is it proper and legal that a Federal Court, on consideration of a motion for the disbarment of a member of its bar, should use, as the only cause of action, a State Court disbarment decree, when 1) said State Court decree was rendered in direct disregard of the Constitution of the State; and 2) the alleged reason for disbarment being unsound and capricious, the said State Court decree, and consequently the decree of the Federal Court which wholly follows and depends upon it, deprive the lawyer of his property right to practice his profession, without due process of law?

2.

When a State Supreme Court has handed down a decision [1] decreeing that a lawyer was suffering from a mental condition and impairment on account of which he was irresponsible and should be treated and considered accordingly, is it proper, legal and just that the same State Supreme Court should decide, some years later,[2] when the lawyer has recovered from his mental affliction and resumed professional practice, that he should be disbarred and deprived of his property right to practice his profession, on account of the very acts as to which the State Court previously had solemnly declared.[3] that the lawyer, because of his mental condition, was not responsible or accountable?

3.

Does a disbarment decree satisfy the requirements of due process of law under the Fourteenth Amendment, when it deprives a lawyer of his property right to practice his profession and earn his living, for the sole and exclusive reason that, eighteen years previous, he committed acts for which the Court at that time decreed that he should not, because of his then mental condition, be held responsible; when, at the time of the bringing of said disbarment suit eighteen years later, the lawyer had unques-

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[1] State v. Theard, 212 La. 1022, 34 So. (2d) 248.

[2] Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. (2d) 310.

[3] See Note 1, supra.

tionably recovered his physical and mental health fully, had already resumed a very active law practice, and during the six years immediately preceding the disbarment, had briefed, tried and argued thirty-seven cases, without one word of criticism or reprobation in the appellate courts of the State? (Tr. p. 19).

4.

Can a State Supreme Court, after putting aside all other considerations and specifically refusing to consider any charges of willful misconduct as strenuously urged by the prosecuting Bar Association Grievance Committee, enter a valid decree of disbarment based entirely on mental illness and irresponsible acts, as conceded by the Court itself; when the entire question of disbarment and the power and jurisdiction of the said Supreme Court to act in disbarment matters depend exclusively on the State Constitution, which specifically provides that the only cause for disbarment in the State is willful misconduct? [4]

5.

And can a Federal Court with propriety adopt such a decree as the sole cause of disbarment in a case in its jurisdiction, when it is patent that illness is not misconduct, and the lawyer, many years later and having fully recovered from his illness, is thus deprived of his property right to practice his profession, without due process of law?

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[4] La. Constitution (1921), Article 7, Section 10. Appendix to this Brief, page

Is it proper to entertain a claim for disbarment when the alleged cause of action, although fully publicized and widely known at the time, has been allowed to remain dormant for nearly twenty years, during which interval the lawyer had completely recovered from his illness and, for at least six years immediately preceding the disbarment decree, has resumed active practice, and without the slightest criticism or question, has argued numerous cases in the appellate courts of the State?

STATEMENT OF THE CASE.

Theard, the petitioner, was born in New Orleans on July 17, 1888. He was graduated from the Tulane Law School in 1910 and was admitted to the bar that year. For a few years he was associated with his uncle, the late Charles J. Theard, but on the whole has always practiced law alone.

In 1916, he became the Editor in Chief of the (Tulane) Southern Law Quarterly (Volumes 1; 2 and 3), which Law Review was stopped by the first world war. When said Journal was resumed as Volume 4 of the Tulane Law Review, petitioner was a member of its Editorial Board, a position which he held until his illness in 1935.

He became an expert in probate law and practice, and from 1919 to 1935—sixteen years,—taught practice, wills and administration, part time, in the Tulane Law School. However, his nervous condition had become so

acute that he was compelled to give up his teaching at the beginning of the 1935 law school term.[5]

He was also proficient in land law and Louisiana titles; was the attorney for more than twenty years of a large New Orleans building and loan association; was Chairman of the Legislative Committee and general counsel of the Louisiana Homestead League; and was at one time Chairman of the Legislative Committee of the United States League of Building and Loan Associations.

His affairs became seriously involved, and on August 4, 1936, he was charged with embezzlement by one Georgine Denis Merrill.

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[5] The work of petitioner as a part-time professor of civil law (descent and distribution, wills, administration) in the Tulane Law School for sixteen years (from 1919 to 1935) was a valuable contribution rendered by him to his chosen profession, without one cent of pecuniary return. When petitioner's increasingly nervous condition necessitated his resignation in 1935, the measure of his contribution to Tulane and legal education was expressed in a Resolution of the Law Faculty signed by Hon. Rufus Carrollton Harris, then Dean of the Tulane College of Law and since 1937 President of Tulane, in part as follows: "It is with sincere regret . . . that the Faculty tenders this expression of its acknowledgment and deep appreciation of the high quality of the service rendered by Mr. Theard to the institution during the many years of his close connection with it and its affairs, a service characterized at all times by technical and class-room ability of a high order, by a spirit of intense loyalty to the School, and by a disposition which endeared him to students and colleagues alike . . ." And Hon. Paul Brosman, then Assistant Dean of the College of Law (subsequently and until his recent death a Judge of the Military Court of the United States) wrote the petitioner at the time of his resignation: "Never have I known a more loyal and able body of part-time teachers than is found in our practitioner colleagues at Tulane, and among them no one has evidenced more interest in, and devotion to, the School and the cause of modern legal education than yourself . . ."

In the Merrill case, Theard plead insanity. He was moved to DePaul Sanitarium, New Orleans, as a patient on September 2, 1936, where he was confined until July 27, 1943, on which day he was moved on Court order to East Louisiana State Hospital for the Insane at Jackson, Louisiana. He remained at Jackson until February 17, 1944, and was returned to New Orleans and held in the Parish Infirmary at New Orleans until February 25, 1947, when, **having been tried by a jury on the charge of Mrs. Merrill, he was ACQUITTED.**

He was thus hospitalized as an insane person, in private and State institutions continuously from September 2, 1936, until February 25, 1947,—TEN YEARS, FOUR MONTHS AND TWENTY-THREE DAYS.

Theard's civil interdiction, which had been initiated in August 1936, was lifted by a decree of the Civil District Court (probate) in May, 1948; and **Theard, having fully recovered from his illness, thereupon resumed the practice of law, which he pursued industriously and constantly until April 26, 1954,** (See list of cases argued by him, Tr. p. 19), **when the decree in the State disbarment suit against him became final.** Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. (2d) 310.

On June 16, 1952, the State Bar Association, through its Committee on Grievances and Ethics, sued Theard for disbarment.

The alleged offense was said to have been committed on January 2, 1935,—seventeen years previously.

The respondent (now petitioner) filed several exceptions: Prescription, laches and delay; estoppel; the

illness—insanity—as will be fully shown in the present Brief, p. 13, judicially found and acted on in Theard's favor by the Louisiana Supreme Court in the case, State v. Theard, 212 La. 1022, 34 So. (2d) 248.

These several defenses, all of them (we say with respect) well founded and which should have been maintained, were overruled and adversely disposed of by the Louisiana Supreme Court in its two opinions in the disbarment case: the opinion on the exceptions, 222 La. 328, 62 So. (2d) 501; the opinion on the merits, 225 La. 98, 72 So. (2d) 310.

The Federal Court, we submit, erroneously followed the State ruling. The Circuit Court of Appeals did not discuss petitioner's defense and argument, merely stating in its memorandum opinion (Tr. p. 25) that his contentions were not persuasive. (Tr. p. 24). Petitioner's application for certiorari was granted by this Court.

Summary of Argument.

(Please refer to Subject—Index for Analysis and Summary of Petitioner's Argument.)

(1)

Under the Louisiana Constitution, willful misconduct is the only ground which furnishes a basis for disbarment. When the Louisiana Supreme Court renders a decree of disbarment for a cause other than misconduct, the decree is void for lack of jurisdiction *ratione materiae*.

The period of more than ten years during which Theard was continuously confined in mental hospitals and

treated for his infirmity until his complete recovery and restoration to mental health, has already been detailed. (See details of petitioner's treatment and confinement in mental institution, this brief, p. 7). Suit for his civil interdiction had been instituted in August 1936; judgment duly rendered.

It has always been fundamental in Louisiana that the right to disbar is strictly statutory, and for the last sixty years (See the State Constitution of 1898) disbarment has always depended on, and been limited by the State Constitution. *Louisiana State Bar Association v. Connolly*, 201 La. 342, 9 So. (2d) 582; *Louisiana State Bar Association v. Leche*, 201 La. 293, 9 So. (2d) 566.

Misconduct is the only ground.

The Supreme Court lacks jurisdiction in any attempted disbarment on the ground of insanity, for insanity is not misconduct.

Supreme Court Jurisdiction, Louisiana Constitution, Article VII, Section 10:

> ". . . It (the Supreme Court) shall have exclusive original jurisdiction **in all disbarment cases involving misconduct of members of the bar,** with the power to suspend or disbar under such rules as may be adopted by the court. . . ."

And the Rule which the Louisiana Supreme Court made on this subject, conforms strictly to the Constitutional limitation on disbarment, and specially provides that the misconduct of a lawyer to justify disbarment must be "Willful" misconduct.

(This Rule made by the Supreme Court was placed by the Court for convenience of reference in the Charter of the Louisiana State Bar Association, and is reproduced as Section 4 of Article 13, of said Charter, in West LSA Revised Statutes of Louisiana, Vol. 21, page 380. See Appendix to the present Brief, page 44).

Louisiana State Bar Association v. Connolly, 201 La. 342, at page 353, 9 So. (2d) 582, at page 585:

> "A consideration of the lucid language used in the Constitution makes it apparent that, while this Court has been vested with exclusive original jurisdiction in all disbarment cases, **the jurisdiction is expressly limited to cases involving misconduct of the members of the bar. . . .**"

At page 354, 201 La., and page 586, So. (2d):

> ". . . the language used in Section 10 of Article VII is too clear and direct in its meaning to authorize us to inquire into the reasons which prompted the Convention" (Louisiana Constitutional Convention of 1921) "to limit our jurisdiction to matters involving misconduct of members of the bar. Hence, it must be resolved that **this Court, in exerting its recognized inherent power to enact rules governing the conduct of the members of the bar, is without right to pass a rule applicable to disbarment proceedings having for its purpose the creation of a separate and distinct ground for disbarment which is not founded upon acts of misconduct. . . .**"

At page 362, 201 La., and at page 588, 9 So. (2d):

> "Therefore, in conformity with the rulings in the Fourchy (106 La. 743, 31 So. 325) and Weber

(141 La. 448, 75 So. 111) cases, we hold that, while the Court has the right and authority to pass any reasonable rule respecting disbarment cases involving misconduct of attorneys, it cannot extend its jurisdiction by rules creating independent grounds for disbarment not founded upon acts of misconduct".

At page 378, 201 La., and at page 593, 9 So. (2d):

". . . our jurisdiction in disbarment cases is limited to matters involving misconduct and **we cannot create by rule grounds for disbarment which are not predicated upon wrongdoing".**

Theard's disbarment was based wholly on the Court's concept (entirely at variance with the Constitutional limitation of the Court's power in disbarment cases) that a lawyer may be disbarred for an act committed whilst insane, which certainly cannot constitute misconduct.

In 225 La. 98, 72 So. (2d) 310, the State disbarment decision, on which the present proceedings in the Federal Court wholly and completely depend, the Supreme Court, in considering the Commissioner's report and this case on its merits, despite the Constitutional limitation that disbarment cannot be granted on the ground of insanity, reiterated its views previously expressed on defendant's exception and defense of insanity, and said (at page 106, 225 La.; at page 313, 72 So. (2d)):

"Now, in opposing the Commissioner's report, respondent first assigns error to the conclusion that the **abnormal mental condition existing at the time of the commission of the wrongful acts** does

not constitute a defense to disbarment. Influencing that conclusion, as the Commissioner points out, were certain pronouncements of this court made in connection with our consideration of respondent's tendered and overruled exceptions to the petition, they having been as follows: . . . **we do not view the mental deficiency of a lawyer at the time of his misconduct to be a valid defense to his disbarment.** . . . takes it for granted that, because evidence has been produced indicating that respondent was probably suffering from amnesia and other mental deficiencies at the time of his misdeeds, his insanity **(which we will concede for purposes of this discussion) operates as a complete bar to this proceeding. We think that counsel is mistaken in his assumption . . . in our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent** (emphasis by the Court). . . . Petitioner (the complainant, Louisiana State Bar Association) herein . . . excepts to that part of the Commissioner's report which holds that respondent 'was suffering under an exceedingly abnormal condition, some degree of insanity'. . . . **However, in view of the conclusion reached and hereinabove declared, we need not determine the Committee's exception".**

It will be noted that the Court talks of "dishonest conduct", "commission of the wrongful acts", "misdeeds". However, **IT CONCEDES INSANITY FOR THE PURPOSE OF ITS RULING. And yet, it does not explain how the acts of a person insane, bereft of reason and irrespon-**

sible, can constitute "misconduct", the only basis of its jurisdiction to disbar, under the Constitution.

With the greatest respect, but most earnestly, we must say that we cannot bring ourselves to the belief that insanity is misconduct, and that a lawyer, who under the Constitution can be disbarred only for misconduct, can be deprived of his license to practice for the reason that years ago he suffered a mental breakdown.

The judgment of the State Court which was presented to the Federal Court as the sole cause for disbarment (Tr. p. 1), is based on insanity, a subject which the Louisiana Constitution did not bestow or vest in the Supreme Court as a ground for disbarment. The Louisiana Supreme Court, whose power of disbarment is limited to cases of misconduct, lacks jurisdiction and power to disbar an attorney for an act committed during insanity. Such a judgment is not binding and, **when presented, as in the present case, as the exclusive complaint and cause of action, cannot serve as a proper and legal basis for the disbarment of a lawyer, in the Federal Courts.**

(2)

The disbarment decision of the State Court, on which the decree of the Circuit Court of Appeals is based, is especially regrettable, since said State Court disbarment is at variance with another decision of the same Court which had given due consideration to the fact that petitioner could not be held responsible since his acts were due to conditions beyond his control.

Very shortly after he had been acquitted in the Merrill case, Theard was arraigned on March 11, 1947, on

the charge made by the Banking Department on an affidavit which had been pending against him since August, 1936. The Trial Judge in the Criminal District Court quashed this charge on the ground of prescription. The Supreme Court affirmed. State v. Theard, 212 La. 1022, 34 So. (2d) 248.

The decision in that case (212 La. 1022), is very important in the present discussion, because the Louisiana Supreme Court later disbarred Theard for an act committed during the mental illness and period of irresponsibility which he could not control and for which he was in no way responsible. **The acts charged to petitioner in the two cases were the same; in one instance, the Court held[6] that, in dealing with the matter, it should consider that these were acts which Theard, because of his mental condition, could not control; in the other,[7] the Court decided that, despite and conceding Theard's insanity, he should be disbarred on account of the said irresponsible acts.** The Supreme Court, thus officially noting and acting on Theard's mental condition, said in the earlier case, p. 1031, 225 La., p. 251, 34 So. (2d): **"If this defendant had stopped the running of prescription through some intentional and deliberate act on his part, we unhesitatingly would declare it an interruption. But since the cessation here occurred by reason of an unfortunate circumstance over which he had no control, certainly it would be most unfair to impose the penalty upon him".**

And yet, the same Court held Theard subject to the penalty of disbarment for an act committed during

[6] State v. Theard, 212 La. 1022, 34 So. (2d) 248.
[7] Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. (2d) 310.

this same mental condition of illness and irresponsibility, "an unfortunate circumstance over which he had no control". State v. Theard, 212 La. 1022, 34 So. (2d) 248, 251.

Such a variance in decision and doctrine certainly shows that the disbarment decree was not well founded and was quite arbitrary. A State Court decision and the federal court decree following it, which undertake to deprive a lawyer of his right to practice on grounds that are neither stable nor sound and are at variance with another decree referring to the same facts and holding that the acts referred to were due to illness and were not deliberate or responsible—deprive the lawyer of his property right to practice his profession without due process of law—

(3)

This case is absolutely unique. No other disbarment decision has been found where the Court conceded the insanity of the defendant lawyer and disbarred him for that reason alone.

This case is unique because there is no other case in the books, where a court, in one decision, absolved the lawyer-defendant from all responsibility because of his mental infirmity releasing him from culpability as a criminal, and by another decision, more or less in the same breath, declared that, because of this insanity and excluding all charges of felonious and willful conduct, it would nevertheless disbar the lawyer solely on account of his said insanity; all this despite the complete recovery of the lawyer at the time of the decision and for some seven years previously.

The statement at page 10 of the brief of the Solicitor General herein, that, according to the accepted rule, disbarment may be based on acts committed during insanity, is not supported by the decisions which he cites. In the *Patlak* case, 368 Ill. 547 (which is also the case cited by the Louisiana Supreme Court), the Court was not satisfied with the evidence of respondent's insanity. Here are its very words:

> "The testimony is conflicting as to whether Patlak was sane or insane on the respective dates he had the transactions with the five named complainants. . . ."

Contrary to the purpose for which cited, the Pennsylvania Court declared in the *Kennedy* case, 178 Pa. 232, 35 Atl. 995, that, if it were satisfied by the evidence that the respondent was of such unsoundness of mind as to be actually insane and to render him unable to have known the difference between right and wrong, it might feel inclined to follow the argument of his counsel. But the Court found the evidence insufficient to establish respondent's insanity. In the case now before this Court, the insanity of the petitioner is established by the judgment of the same State Court which ordered his disbarment for that reason exclusively and, further, said insanity is conceded as the sole basis of the State Court's decree of disbarment!!!

> Said the Court: ". . . in our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent." Louisiana State Bar Association v. Theard, 225 La. 98, at page 108, 72 So. (2d) 310, at page 313.

In the *Manahan* case, 186 Minn. 98, 242 N. W. 548, respondent was afflicted with a painful dermatitis of the hand and feet brought about by a nervous condition. The referee found that respondent was fully capable of distinguishing between right and wrong and of appreciating the consequences of his acts. The Minnesota Court did not say that it would disbar an attorney for acts committed whilst insane.

In the *Fitzgibbons* case, 182 Minn. 373, 234 N. W. 637, the Minnesota Court held that respondent's mental powers had not been affected by an operation which left him subject to attacks of epileptiform and periodic nervous disturbances. Again, the Court did not say that it would disbar the attorney even if it had found (which it did not) that this mental condition had affected his capacity to distinguish right from wrong.

In re Nicolini (N. Y.), 262 Appellate Division Reports, 114, a psychiatrist, in response to a hypothetical question, "thought" that due to domestic troubles between the defendant and his wife, he was under a "tremendous emotional upheaval" during the time in question. The Court held that defense was insufficient.

In re Vincent (Ky.), 282 S. W. (2d) 335, a case of suspension. The Court considered "some physical and mental disturbance" and considered same insufficient.

In re Bivona (N. Y.), 261 Appellate Division Reports, 221, 222, the defendant suffered from epileptic amnesia, but the Court said: "There is no evidence, however, that the acts complained of resulted from such a condition."

In re Creamer, 201 Oregon 343, 270 P. (2d) 159, the Court approved a finding of professional misconduct, but stated that the record showed that, at the time defendant committed the acts, he was suffering from a mental disorder. The Court held (in a decree closely applying to the issues now before this Court) that, on a showing of patient's recovery, he might be reinstated.

(4)

A license to practice one of the learned professions constitutes property, and to deprive a lawyer of that property for an alleged reason insubstantial, arbitrary, and unknown in law, violates substantive due process.

We pleaded in the Louisiana Supreme Court that a lawyer could be deprived of his right to practice, which constitutes property, only for a sufficient and substantial reason; and specially, that he could not be removed from practice because years ago he was insane. Petitioner has presented the same defense here.

We think we have shown that the petitioner has completely recovered his health, mental and physical; that he argued thirty-seven (37) cases in the Louisiana appellate courts since his civil interdiction was lifted in May, 1948, and up to the disbarment decree in April, 1954, and that not one word of criticism has been levelled against him.

Our contention that the right to practice law is property entitled to protection under substantive due process, was mistakenly answered by the Supreme Court (225

La. 98, 72 So. (2d) 310, 315) with the quotation of a statement from Corpus Juris Secundum, Volume 7, *verbis* "Attorney and Client", Sect. 4 (b), that the right to practice law is a privilege to be earned by hard study, and that it is not property, and that the lawyer's right to due process exists only to the extent of procedural due process, *i. e.*, that he should have opportunity for defense when anyone tries to disbar or suspend him from practice. The Court added that this was its appreciation of the decisions in *Ex Parte Garland*, 4 Wall. 333, 18 L. Ed. 366, and *Ex Parte Robinson*, 19 Wall. 505, 22 L. Ed. 205.

But the Supreme Court was mistaken about what these cases hold.

Ex Parte Garland definitely holds that, when once bestowed, **the right to practice law is property and cannot be taken away without substantive due process;** and it follows, that illness twenty years ago cannot be sufficient ground for disbarment, when the lawyer has now fully and completely recovered and has demonstrated his recovery by great activity in the appellate tribunals of his State and by even greater activity at *nisi prius*,—all this for nearly ten years without a single criticism or complaint from anyone.

This Court, in *Ex Parte Garland*, 4 *Wall.* 333, at page 379; 18 L. Ed. 366, at page 370, said:

> "The attorney and counsellor being, by the solemn judicial act of the Court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and argue causes, is something more than

a mere indulgence revocable at the pleasure of the Court or at the command of the Legislature. **It is a right of which he can only be deprived by judgment of the Court, by moral or professional delinquency."**

Certainly, a lawyer, stricken with a mental breakdown, cannot for that reason be characterized as a person guilty of moral and professional delinquency.

And in *Ex Parte Robinson*, 19 Wall. 505, at page 512, 22 L. Ed. 205, at page 208, the Supreme Court in holding that summary disbarment was not the proper remedy for a lawyer's conduct allegedly contemptuous, held, affirming *Ex Parte Garland:*

". . . the power (to disbar) can only be exercised where there has been such conduct of the parties complained of as shows them to be unfit to be members of the profession. . .. The order of admission is the judgment of the Court that they possess the required qualification both in character and learning . . . they hold their office during good behaviour and can only be deprived of it for misconduct . . . he (the attorney) should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This . . . should be equally followed when proceedings are taken to deprive him of his right to practice his profession as when they are taken to reach his real or personal property."

The proposition that the right to practice one's profession is a property right which, like any other property right, cannot be taken away capriciously and without

proper, relevant and adequate cause, is well stated in *Frank M. Dent v. The State of West Virginia*, 129 U. S. 114, at page 121, 32 L. Ed. 623, at page 625, 9 Sup. Ct. 231, at page 233:

> "It is undoubtedly the right of every citizen of the United States, to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions. . . . All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. **The interest or as it is sometimes termed the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them any more than their real or personal property can thus be taken away** . . . p. 626)."

> **"The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizens.** As said by this Court in Yick Wo v. Hopkins, speaking through Mr. Justice Mathews: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. 118 U. S. 369, 30 L. Ed. 220, 226. See also, Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. Ed. 565, 572; Davidson v. N. O., 96 U. S. 97, 104, 107, 24 L. Ed. 616, 619, 620; Hurtado v. California, 110 U. S.

516, 28 L. Ed. 232; Mo. Pac. R. v. Humes, 115 U. S. 512, 519, 29 L. Ed. 463, 465 . . . (p. 628) one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions, by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions".

(5)

Recent decisions in the Supreme Court of the United States have strongly emphasized that the individual, in respect to his estate or right of property in his employment or profession, enjoys basic rights secured by the Constitution, which must be protected.

In *Wieman v. Updegraff*, 344 U. S. 183, 97 L. Ed. 216, 73 Sup. Ct. 215, decided December 15, 1952, by the Supreme Court of the United States, certain professors in the Oklahoma Agricultural and Mechanical College were dismissed because they refused to sign a **statutory loyalty oath** under which they were called upon to swear that they had not within five preceding years been members of any organization officially determined as subversive by the United States Attorney General. The refusal of an official to sign was to be followed by his automatic removal from the public service. **This drastic rule operated without reference to any knowledge on the part of any official at the time, in the nature or objectives of the banned association.** In an action instituted to re-

strain the payment of salaries to these officials who had declined to sign the oath on the ground that it lacked due process, the Supreme Court, reversing the Oklahoma tribunals, said (344 U. S., at page 189, 97 L. Ed. 221, 73 Sup. Ct. 190):

> "Knowledge is not a factor under the Oklahoma statute. We are thus brought to the question . . . whether the due process clause permits a State in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership regardless of their knowledge concerning the organization to which they had belonged. For under the statute before us, the fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one. But membership may be innocent . . . . There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one, indeed it has become a badge of infamy. . . . **Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.** We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that **constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory.**"

It is not difficult to analogize, phrase for phrase and almost word by word, the disbarment of petitioner Theard, in the light of the principles announced by the

Supreme Court of the United States in the above decision: Misconduct and culpability are not factors in the disbarment of petitioner. We are brought therefore to the question, whether the due process clause permits a Court in attempting to exclude unworthy members, to disbar lawyers solely on the ground of illness, for acts performed during a period of mental infirmity and nerve breakdown, without regard to the absence of any criminal intent. For, under the Louisiana Supreme Court decision, and therefore under the ruling of the federal courts which adopted it, **the fact of insanity alone disqualifies. Said the Court: "In our opinion it matters not whether the dishonest act stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent." If insanity be expressed as a presumption of wrongdoing on the part of a lawyer, it is a conclusive one. But the acts of a concededly insane person are innocent and connote neither criminality nor wrongdoing.** Nor can there be any dispute regarding the consequences visited upon an attorney excluded from his chosen profession by disbarment. In the view of the community, the stain is a deep one, indeed it has become a badge of infamy. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The removal from the practice of law of a licensed person who was bereft of reason and committed no wrong, offends due process. We need not pause to consider whether *ab initio* any abstract right exists to be received in the legal profession. It is sufficient to say that constitutional protection does extend to a lawyer whose disbarment is patently arbitrary and discriminatory.

(6)

Dr. Barsky's Case.

In the matter of *Dr. Edward A. Barsky v. The Board of Regents of the University of the State of New York*, decided by the United States Supreme Court on April 26, 1954, the appellant; a physician, refused to testify and to produce before a Committee of Congress, certain records of an Association of which he was an officer. He was held guilty of contempt, tried in the District Court, and sentenced to a six months prison term, which he served. He was then suspended from practice for six months by the highest medical regulatory board of the State of New York. His appeal to the New York Courts failed, but his application for certiorari was granted by this Court. The case on its merits is reported in 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650.

This Doctor Barsky was unquestionably guilty of a wrong; he had flaunted Congress, admittedly was guilty of contempt, on account of which he had served a prison sentence.

But the constitutional difficulty in the *Barsky case*, as discerned by three of the Justices of this Court, lay in the fact that his suspension from the work of his chosen profession was hardly a matter which bore any reasonable relation to his refusal (probably mistaken) to produce certain books of some Association having not the remotest relation to the practice of medicine, and which Congress or one of its Committees considered it had the right to inspect.

On the other hand, the petitioner Theard, under his conceded insanity on which the decision of the Louisiana

Supreme Court is based, which ruling was apparently adopted by the Circuit Court of Appeals, has not been guilty of any wrongdoing. **Since the Court concedes for the purpose of its decision that he was insane, he has been disbarred despite said insanity, because the Louisiana Court held that this admitted insanity offered no defense to any act committed by him whilst he was *non compos mentis*.** It will be remembered that there can be no mistake about this, the Louisiana Court having declared unequivocally (225 La. 98, 72 So. (2d) 310, 313) in disbarring him: **"We do not view the mental deficiency of a lawyer at the time of his misconduct to be a valid defense to his disbarment. . . . In our opinion it matters not whether the dishonest act stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent".**

The suspension of Dr. Barsky was finally approved by this Court, but as stated he had been guilty of a reprehensible and illegal act, **while Theard, conceded by the decision of the Supreme Court to have been insane, could not, in logic, medicine or law, be held guilty of any actionable offense or wrongdoing.**

(7)

The dissents of Associate Justices Black, Frankfurter and Douglas, in the Barsky case.

Even under the circumstances stated and despite Barsky's admitted offense, three of the Justices of this Court had no hesitancy in condemning Barsky's suspension from his chosen field of professional work, which bore no relation to the alleged offense before the Congressional Committee on account of which he had been imprisoned.

We must conclude from what Associate Justices Black, Douglas and Frankfurter said in the *Barsky* case (347 U. S. 442, 98 L. Ed. 829, 74 S. Ct. Rep. 650) that they are unquestionably of the opinion that there must be a relevant and substantial reason for a decree of professional suspension or disbarment; and on the basis of these principles, since the petitioner was disbarred for acts committed whilst he was concededly irresponsible, and, under the decision of the State Court, without reason legal or valid, we ask this Honorable Court to refuse to recognize and follow such a doctrine so definitely criticized and condemned by three of its members and which cannot be harmonized with the holding of this Court in *Wieman v. Updegraff*, 347 U. S. 442.

Will the Honorable Justices who so strongly defended Dr. Barsky's right to practice his profession despite his wrongdoing, be less disposed to recognize the Constitutional protection due to a lawyer who has surely demonstrated his complete restoration to health and who was disbarred for acts he unwittingly committed during a period of conceded mental infirmity now nearly twenty years ago?.

In the *Barsky* case, Justice Black (with Justice Douglas concurring) said, (p. 459) 98 L. Ed. 843, 74 Sup. Ct. 659:

> ". . . the right to practice is . . . a very precious part of the liberty of an individual physician or surgeon. **It may mean more than any property.** Such a right is protected from infringement by our Constitution, which forbids any State to deprive a person of liberty or property without due process

of law . . . (p. 463). The very idea that one may be compelled to hold his life or the means of living or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails. . . . Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment. . . ."

Justice Frankfurter (p. 470); 98 L. Ed. 849, 74 Sup. Ct. 665:

"It is one thing to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession . . . . (p. 471). The limitation against arbitrary action restricts the power of a State 'no matter by what organ it acts'."

And Justice Douglas (with Justice Black concurring) (p. 472); 98 L. Ed. 850, 74 Sup. Ct. 666, said:

"The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. . . . The great values of freedom are the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellowman. . . . The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain

> rights are protected, that certain things shall not be done. The Bill of Rights prevents a person from being denied employment who . . . is wholly innocent of any unlawful purposes or activity. Citing Wieman v. Updegraff, 344 U. S. 183 . . . (p. 474)."

Our thesis is that, where a man of previous irreproachable conduct and standing at the bar as an active practitioner for then nearly thirty years, becomes ill and suffers a *nervous breakdown*, and during said period of breakdown is involved in acts which are subject to criticism, but which according to a well considered opinion of the Supreme Court show that he was insane at the time and should not in reference thereto be treated as a criminal; and when that man is treated and hospitalized for this condition for nearly eleven years but regains his health completely in 1948, his civil interdiction being lifted by court decree; whereupon he resumes practice and thereafter practices for *six years* without one word of criticism of his conduct, personal or professional, and during these six years (1948 to 1954) tries 37 contested cases in the appellate courts and countless cases in the lower tribunals,— it is submitted that his disbarment, merely for the reason that he suffered from this condition of illness more than twenty years before, deprives him of his *property right* to practice his profession without adequate cause, illegally; and in violation of Due Process, contrary to the Fourteenth Amendment and the principles enunciated by this Court in *Ex Parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Wieman v. Updegraff*, 344 U. S. 187, 97 L. Ed. 216, 73 Sup. Ct. 215, and the dissenting opinions of Associate Justices Black, Douglas and Frankfurter in *Barsky v.*

Board of Regents, 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650.

(8)

It is universally conceded that disbarment is not by way of punishment but is motivated for the protection of the public and to maintain a proper level of professional standards and responsibility. The petitioner, undoubtedly subject to insanity and not responsible for his act in 1935, as found and reported by the Master appointed by the Louisiana Supreme Court to hear the testimony in the State disbarment suit,[8] had happily regained his health and was decreed to be fully cured and competent in 1948 by the judgment (after a full hearing) of the Civil District (probate) Court for the Parish of Orleans, which thereupon canceled his civil interdiction. From that time (1948) and until the decree for his disbar-

[8] The Court, in Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 2d 310, referred to the Commissioner's report, as follows:

"After termination of the hearing, the Commissioner prepared and filed a lengthy and well considered report, in which he analyzed the evidence, set forth his findings of fact . . . In summing up the evidence, he commented:

'. . . No evidence was produced by counsel for the Committee, nor even offered, to rebut the alleged mental condition of the respondent. It must then, from the record, be held that the respondent was suffering under an exceedingly abnormal mental condition, some degree of insanity.'

'. . . The Court disregarding this finding but nevertheless conceding the insanity of respondent, said: ". . . Counsel for respondent apparently takes it for granted that, because evidence has been produced, indicating that respondent was probably suffering from amnesia and other mental deficiencies . . . his insanity (which we will concede for purposes of this discussion) operates as a complete bar to this proceeding. We think that counsel is mistaken . . . **In our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent**"—(Emphasis by the Court).

ment in 1954, petitioner's active and irreproachable professional conduct and pursuits have conclusively demonstrated his present complete responsibility and restoration to normal health. It cannot now be claimed seriously or in good faith that, for the purpose of protecting the public, the petitioner, who is now in every way competent and responsible, should at the present time be deprived of the right to practice his profession in the Courts of the United States.

(9)

The inexcusably long delay in bringing this disbarment suit, which in Louisiana is prescribed or at least should be considered as abandoned on the ground of laches.

The U. S. Attorney, complainant herein, naturally acted only after the decision of the Louisiana Supreme Court on the merits. 225 La. 98, 72 So. (2d) 310. But the present Rule, which rests wholly on the action taken in the State Court, can hardly secure any vitality from the belated proceedings on which it depends so closely; and it is proper to say that the action in the State Court against the present petitioner should have been dismissed under the law of Louisiana as prescribed, or at least as abandoned on account of laches.

A delay of seventeen years (from 1936 to 1952) in the institution of disbarment proceedings in a State Court is hardly calculated to create confidence in the justness of the complaint.

Stale claims and causes of action in disbarment are not favored.

In this case, the inordinate delay in commencing this State disbarment suit created serious misgiving about the propriety of the prosecution itself; and, inevitably, in the present federal court proceedings, since the only cause of disbarment was the decision of the State Court based only on the irresponsible acts of an ill man during a mental breakdown many years previous, the decision of the District Court and its affirmance by the Circuit Court of Appeals come here so limited in application and effect and so shorn of sanction and authority, as to be entitled hardly to prima facie acceptance and recognition.

The Louisiana State Bar Association or its predecessor held a hearing as to the affairs of respondent in 1937. Theard was a patient in DePaul and unable to attend. So far as Theard knows, nothing ever resulted from this hearing.

The representatives of the Association and the Bar Committee say that this delay to the filing of the State disbarment action in 1952 was made necessary by Theard's illness and interdiction. It is submitted that this is not correct.

The law very clearly provides how an interdict or any person who without being interdicted is the inmate of a mental hospital shall be sued. La. Code of Practice, Articles 115 and 964 (as amended by La. Act 308 of 1910).

These rules apply to disbarment suits, which are to be tried according to the Rules and precepts prevailing in all civil actions. *In re Kenner*, 178 La. 774, 152 So. 580.

There was no reason and no excuse why, if they believed they should act, the representatives and com-

mittees of the Bar Association or Associations should wait from August 1936 until June 16, 1952 (when petitioner had fully regained his health and had already resumed active law practice for six years) to bring their suit against him.

When brought finally in 1952, the disbarment suit in respect of a cause of action which it was averred had occurred on January 2, 1935, and which certainly was widely known in the summer of 1936, was prescribed.

In Louisiana, all personal actions, not subject to any prescription specially enumerated in the Civil Code, are subject to the prescription of ten years. R. C. C., Art. 3544.

In the disbarment action, *State v. Fourchy*, 106 La. 743, 31 So. 325, 331, the defendant pleaded the prescriptions applicable in criminal law to felonies and misdemeanors. The Court made it very clear that the disbarment suit is strictly a civil action; and, said the Court: "to the method by civil proceedings thus supplied (for disbarment), the rule of prescription which relates to civil . . . actions is to be applied . . . Counsel for defendant claims that if this view be adopted, the action is nevertheless barred by the prescription of one year as declared by Civil Code, Art. 3536 against actions resulting from offenses . . . But the obligation which rests upon an attorney (is) . . . a special obligation. . . . And the action to disbar him is predicated upon the breach of that obligation . . . and the only prescription applicable to the action growing out of such violation seems to be that of ten years". (R. C. C., Art. 3544).

In the Theard disbarment case, this prescription of ten years was specially pleaded, but without mentioning it specially the Court held, apparently without giving any reason, that no definite ruling need be announced on that point despite its obvious tremendous importance. The Court said (222 La. 328, 62 So. (2d) 501, at page 504):

> "It is asserted that since the act complained of occurred more than seventeen years ago, the offense is so stale it would be inequitable to permit the prosecution of the proceeding. . . . The exception cannot be maintained. Our law of prescription is purely statutory and the fact that a long time has elapsed between the commission of the acts and the bringing of the charges does not, of itself, provide a just ground for dismissing the suit".

We do not know exactly what the Court meant by this. It certainly says little and decides nothing. The prescription of ten years had been pleaded. Under a discussion, surely not very clear, the point is not decided. No one can say that this somewhat vague disposition of defendant's plea of prescription is either a maintenance or a denial of the plea.

In that condition, the opinion presents no adjudication upon which Your Honors can rely as to what the law is. Therefore, that point of Louisiana law remained undecided, and is now open and subject to Your Honors' appreciation of the widely recognized rule that statutory prescriptions in the several statutes are generally followed in the Federal Court.

Since disbarment in Louisiana is essentially a personal action to be disposed of accordingly, it seemed rather clear that, as stated in *State v. Fourchy*, 106 La. 743, 31 So. 325 this disbarment suit, in view of the then long delay of seventeen years, should have been dismissed because of the respondent's plea of prescription. If Article 3544 applies, and we submit that in the excerpt already quoted (p. ....), the Supreme Court gives no reason why it should not apply, prescription was a very direct defense;—as stated by the Code (Art. 3459) "a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim". Further, under Art. 3530, R. C. C., nothing is required of the debtor who pleads prescription, and as declared by that Article, "the neglect of the creditor operates the prescription . . ."

(10)

Courts in numerous other jurisdictions hold with complete unanimity that stale or prescribed claims for disbarment will be dismissed.

We specially call the attention of this Honorable Court, in addition to the reference to *State v. Fourchy*, 106 La. 743, 31 So. 325, 331, to the fact that the Courts of quite a number of other jurisdictions have, over and over again, declined to subject lawyers to the trial of disbarment suits, where a period of inactivity extending beyond all reasonable delays had accrued before the action for disbarment was instituted.

In not any of these cases that we have been able to find, did the delay in instituting the proceedings for dis-

barment and which the Court disapproved of, even approximate the seventeen (now more than twenty) years which elapsed in the Theard case. And now, the present complainant is asking this Honorable Court to render a decree in respect of an act which occurred in 1935.

In *People v. Allison*, 38 Ill. 151, respondent was sued after a lapse of **SEVEN YEARS.** Said the Court:

> **". . . the law will not favor the institution of prosecutions of this character after the lapse of such a great length of time. The charge is a serious one, and if respondent should be found guilty the consequences would be most disastrous. The party whose rights are injuriously affected by conduct of the character alleged, ought to be required to exhibit his information within a reasonable time, that the attorney implicated might be afforded an opportunity to make his defense while testimony for that purpose could be had. The rule must be discharged."**

In *People v. Coleman*, 210 Ill. 79, a motion was filed to show cause why the defendant should not be disbarred for having concealed his conviction **THIRTEEN YEARS** before. The Court declined to grant the motion, saying:

> "The opportunity and the hope held out to all men to repent and correct their ways if they have ever been wrong are the only possible incentives the law can afford that can work the reformation of men who have gone wrong. . . . We cannot say that no man who has ever had a stain against his character could ever enter the legal profession. Being unable to adopt that view, the motion is denied".

In the *Matter of the Disbarment of C. E. Elliott*, 73 Kansas 151, 84 Pac. 750, fourteen separate charges were laid in the complaint for disbarment. The fourteenth charge was based on an incident which had occurred nearly **FOURTEEN YEARS** before the filing of the charges. Said the Court:

> **"Conceding there is no statute of limitation applicable to a charge of this nature, it must at least be said that it is very stale; and in this quasi-criminal proceeding, the action of the court, and the many years' acquiescence therein of the members of the bar to whom the alleged facts were made known at the time, should be regarded as an acquittal of this charge. . . .** Disposed as is this court to encourage and assist in maintaining a high standard of integrity in the profession of which we are members, and realizing as we do that no profession, except perhaps that of the clergy, demands a cleaner private life or a keener sense of professional honor than does that of the lawyer, we are unable under the evidence to impose a great forfeiture and penalty upon the accused. He is therefore acquitted."

In the case of *In re Adriaans*, 28 App. D. C. 515, the defendant appealed from an order of the Supreme Court of the District of Columbia decreeing his disbarment. The order of disbarment was founded on an offense committed **TWELVE YEARS** before. In reversing, the Court of Appeal said:

> "We appreciate the solicitude of the Court concerning the reputation of members of the bar, and

should not hinder them in purging the roll of attorneys. The disbarment of Adriaans for misconduct which happened about twelve years before is most unusual. **The majority of the justices of the Supreme Court who concurred in the order of disbarment appear to appreciate this, for they say under ordinary circumstances the lapse of time would cause the court to seriously consider the long delay in filing the charges. . . . The career of an unworthy member of the bar is apt to reveal misconduct more recent than in this case, where the proof is legally insufficient to disbar this respondent on account of an offense alleged to have been committed twelve years ago.** The order must be reversed, and it is so ordered."

People v. Tanqueray, 48 Colo. 122, 109 P. 260, shows that in Colorado the court declines to entertain stale charges against members of the bar and summarily dismisses such charges. The Court said:

"Referring to the second charge, it is proper to state that it has ever been the policy of this Court to discourage proceedings of this sort upon stale claims, and properly so as a matter of common justice to the one charged, who otherwise might manifestly be placed at great disadvantage. It is to be noted that the offenses covered in the second count are shown to have occurred about **EIGHT AND ONE-HALF YEARS** before any investigation thereof was made or prosecution thereon begun. These facts alone are, in our judgment, sufficient answer thereto."

In re Sherin, 27 S. D. 232, 130 N. W. 761:

> "While the charges made in these proceedings were, if true, sufficient to show that respondent was, at the time referred to, not only unfitted to be a member of an honorable profession, but absolutely unfitted for the society of respectable people, yet it is and should be the policy of the law to forgive one his errors long since past, and not to allow the same to be resurrected where there is nothing to show but that for several years after such wrongdoing the party may have lived an exemplary life."

In *State, ex rel. Jenett v. Clompton*, 15 Mo. App. 589, the Court dismissed disbarment proceedings brought **FIVE YEARS** after the commission of the alleged offense where the defendant has since conducted himself honorably.

In *State v. Hays*, 63 W. Va. 45, 61 S. E. 355, though holding that a disbarment action was not subject strictly to the statute of limitations, the Court said:

> "Clearly, where evidence shows a turning of one from wrong to right, a living down of gross errors after a sufficient length of time, in which there is a plain demonstration of such disposition to pursue the even tenor of his way, an attorney's name should not be stricken from the roll."

In Kansas, there is no applicable statute of limitation, but stale charges, in common justice, are not entertained. *In re Smith*, 73 Kans. 743, 85 Pac. 584.

The Courts of Illinois hold that the law will not favor disbarment proceedings brought after the lapse of a

great length of time and such proceedings for that reason alone are dismissed. *People v. Coleman*, 210 Ill. 79 **(THIRTEEN YEARS).**

(11)

The fact that an application for certiorari to the Louisiana Supreme Court in the present case was denied by this Court does not constitute a precedent on any issue raised in the present brief.

It is true that the decision of the Louisiana Supreme Court was brought up to the Supreme Court of the United States on application for certiorari and that the said application was denied without comment on October 14, 1954. See Theard v. Louisiana State Bar Association, 348 U. S. 832, 99 L. Ed., Advance, page 33, 75 Sup. Ct. 54.

But the law is well settled that orders of the United States Supreme Court denying writs of certiorari, especially when handed down without reasons or comment, have no authority or standing whatsoever as precedents.

Robertson & Kirkham, "Jurisdiction of the Supreme Court of the United States (1951), Sect. 316, page 603:

> "The fact that the Supreme Court does not sit as a court of errors and appeals in passing upon application for writ of certiorari is pointedly emphasized by its practice of giving no reasons in most cases for its refusal of the applications. See Gaines v. Washington, 277 U. S. 81, 87, 72 L. Ed. 793, 48 S. Ct. 468—. . . by its repeated warnings to

the bar that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. United States v. Carver, 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361; Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401, 403-404, 51 S. Ct. 498, 75 L. Ed. 1142; House v. Mayo, 324 U. S. 42, 48, 65 S. Ct. 517, 89 L. Ed. 739; Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 258, 36 S. Ct. 269, 60 L. Ed. 629; Ohio, ex rel. Seney v. Swift & Co., 260 U. S. 146, 151, 43 S. Ct. 22, 67 L. Ed. 176."

(p. 604):

"Nevertheless, the bar, commentators and at times the lower Courts have alike persisted in drawing inferences as to the merits of controversies or as to jurisdiction of Courts from the fact that the Supreme Court has refused certiorari."

(p. 605):

"The danger with which such indulgence in inference is attended would appear to be sufficiently demonstrated by the not inconsiderable number of cases in which the petition for certiorari has been denied on first application, but has been subsequently granted either on petition for rehearing or sua sponte. . . . Indeed, where counsel has relied on denials of certiorari in similar cases as a reason for failing to appeal in a subsequent case, the Court has held that such failure was not justified."

(p. 610):

> "Denial without expression of reason remains the general practice, and, in view of the volume of applications for certiorari and the complexity of the issues they present, this practice must be adhered to, if the certiorari jurisdiction is to fulfill the function for which it was created."

CONCLUSION.

For the reasons set forth in the present brief, the petitioner Delvaille H. Theard prays that the judgment of the District Judge herein, affirmed by the decree of the United States Court of Appeals, Fifth Circuit, be reversed; and that the motion of the United States Attorney herein (Tr. p. 1), for petitioner's disbarment, be discharged and denied.

Respectfully submitted,

DELVAILLE H. THEARD,
Pro Se.

CERTIFICATE.

Copies of the foregoing brief have been served on J. Lee Rankin, Solicitor General of the United States, and on M. Hepburn Many, United States Attorney for the Eastern District of Louisiana, by depositing said copies in the mail, postage prepaid, at New Orleans, on September 10, 1956.

New Orleans, September ....., 1956.

APPENDIX.

Fourteenth Amendment to the Constitution of the United States, Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Judicial Code of the United States, Title 28, Section 1254 (1):

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree." . . .

———o———

Constitution of the State of Louisiana (1921), Article VII, Section 10:

> "The Supreme Court shall have control of, and general supervision over all inferior courts and shall have further jurisdiction as follows:

"It shall have exclusive original jurisdiction in all disbarment cases **involving misconduct of members** of the bar, with the power to suspend or disbar under such rules as may be adopted by the court. . . ."

Excerpt of Order of Louisiana Supreme Court, of date March 12, 1941:

"The Louisiana State Bar Association is hereby organized under the rule-making power of the Court. The rules and regulations which shall govern it as an agency of the Court are the articles set forth in Exhibit A, which is the proposed form of articles of incorporation, and a copy of which is annexed to this order and made a part hereof, as fully as though copied in extenso herein. The Court hereby adopts and promulgates the articles of said proposed form as rules of this Court".

Charter of Louisiana State Bar Association, Article 13, "Discipline and Disbarment of Members":

Section 1. "The Committee on Professional Ethics and Grievances shall consist of five active members of this Association, appointed by the Supreme Court on the recommendation of the Board of Governors. The term of office of the first committee to be appointed pursuant hereto shall begin. . . ." (Page 377, L. S. A.-Revised Statutes, Volume 21).

Section 4. "If, after investigation, a majority of the Committee shall be of the opinion that the member against whom the complaint has

been made has probably been guilty of a violation of the laws of the State of Louisiana relating to the professional conduct of lawyers and to the practice of law, **or of a willful violation of any rule of professional ethics of sufficient gravity as to evidence a lack of moral fitness for the practice of law,** it shall be the duty of the Committee to institute in the Supreme Court a suit for the disbarment or suspension of the accused member of the bar, and to designate one or more of their number to prosecute the same". (Page 380, L. S. A.-Revised Statutes, Vol. 21).

This Order of Court and said Charter of Louisiana State Bar Association reproduced at pages 353 and following of West's Louisiana Statutes Annotated, Revised Statutes, Volume 21 (1951).

Revised Civil Code of Louisiana:

Article 3544: "In general, all personal actions, except those before enumerated, are prescribed by ten years".

Article 3459: "The prescription by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim".

Article 3528: "The prescription which operates a release from debts, discharges the debtor by the mere silence of the creditor during the time fixed by law, from all actions, real or personal, which might be brought against him".

Article 3530: "To enable the debtor to claim the benefit of this prescription, it is not necessary that he should produce any title, or hold in good faith; the neglect of the creditor operates the prescription in this case".

Louisiana Code of Practice:

Article 115: "Actions against interdicted persons . . . must be brought directly against . . . the curator of the interdicted person".

Article 964: "The above provisions shall not be so construed as to prevent persons having claims against a minor, insane person not interdicted but committed to an insane asylum or a person absent, pursuging the same previous to the interdiction of such insane person or to a tutor or curator having been appointed as above prescribed; but in such cases, the person claiming must in his petition pray the court to which it is addressed to appoint a tutor or curator 'ad hoc' to defend the minor, insane or absent person in the action" (As amended by Act 308 of 1910).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

REPLY OF PETITIONER TO THE SUPPLEMENTAL MEMORANDUM OF THE SOLICITOR GENERAL.

DELVAILLE H. THEARD,
Petitioner,
Pro Se.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

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UNITED STATES OF AMERICA

REPLY OF PETITIONER TO THE SUPPLEMENTAL MEMORANDUM OF THE SOLICITOR GENERAL.

Petitioner has been served with an affidavit made by James G. Schillin, who is Chairman of the State Bar Association Grievance and Ethics Committee; this is attached to a Supplemental Memorandum of the Solicitor General.

In his Supplemental Memorandum, the Solicitor General states that the Bar Committee "has asked that this affidavit be filed with the Court". No supporting authority is cited for such filing.

It seems strange in view of the fact that this Court had not as yet acted on the Solicitor's petition for Bar Committee participation, that the Solicitor General should consider it appropriate that this affidavit, in the nature of a Brief and Argument, should be filed now without the permission of the Court. The result, perhaps unintentional, would seem to be that, no matter what this Court may rule on the application to allow the Committee to file a Brief, this argumentative affidavit, in effect, is now a Bar Committee Brief actually on file in the present proceedings.

———o———

Although he yielded to the Committee's request to file this argumentative affidavit and it therefore comes before this Court with his approval, the Solicitor General declares that he was not originally pressured by the Committee, but that it was he who at the outset "requested the Committee to appear". The Petitioner made no charge that pressure had been used on the Department of Justice by the Bar Committee. What petitioner said (Opposition, p. 2) was, that the Solicitor's request that the Bar Committee be allowed to enter into the case "can only reflect either his own personal preference or else the pressure of a few members of the said Grievance Committee, and certainly cannot be result of any real necessity for any such intervention".

———o———

The premature appearance of the Committee being in the form of a sworn affidavit, the affiant (Schillin) who in effect thus offers on his oath evidence of a controversial

nature, which he expects this Court to accept, stands like, and has no greater privileges than are accorded to, any other witness.

The Louisiana Supreme Court, in a case in which this affiant (Schillin) appeared both as attorney and as defendant-surety, declared that his (Schillin's) contentions on certain material facts were "refuted by the facts in the record". In *Sievers v. Samuel, 172 La. 1005, 136 So. 33*, James G. Schillin (the present affiant) was attorney, and one of the defendants as surety on a forthcoming bond which he refused to discharge. Certain personal property had been delivered on the strength of his personal signature. Said the Court, "it is certain that the Surety" (Mr. Schillin) "by executing the bond obtained the release of the property in the possession of the constable". When sued on the bond, he filed a number of technical defenses, in an attempt, as the Court said, to be released from "his obligation under the bond which he (had) voluntarily signed". The Court declared: "The surety (Mr. Schillin) finally contends that all the property covered by the bond, except the pressing machine, was either returned or tendered to the Constable. **The contention is refuted by the facts in the record**". (Emphasis ours).

It is submitted that, on the basis of the facts above referred to, this affidavit (if it is admissible and can be received on appeal) must be taken like that of any other litigant, subject to all facts of record, which affect the affiant's credibility and his reputation for veracity.

———o———

In point of fact, this affidavit (new matter, wholly outside the Transcript of Record) has no place in this appeal, and should not be considered. In this Court, no evidence of any character can be heard or considered, that was not before the lower Court. *Holmes v. Trout*, 7 Pet. 171, 8 L. Ed. 647; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Mitchel v. United States*, 9 Pet. 711, 9 L. Ed. 283; *United States v. Miller*, 13 Wall. 577, 20 L. Ed. 705; *Boone v. Chilles*, 10 Pet. 177, 9 L. Ed. 388; *Tilt v. Kelsey*, 207 U. S. 43, 28 S. Ct. 1, 52 L. Ed. 95.

Nor does petitioner know when the so-called Transcript, referred to in the affidavit, was placed in the proceedings. From a page numbered 23 of said Transcript, there is found a quotation at page 4 of the Affidavit. Petioner received no notice of the filing of this in this Court or anywhere else; and when the praecipe for the transcript of appeal to the Circuit Court of Appeals was filed, there was, as petitioner believes, nothing corresponding to this of record below.

The Transcript herein, Tr. p. 30, shows that James G. Schillin was permitted to argue as an individual in the District Court, but not as a party. The previous order in favor of the Committee on Professional Ethics and Grievances was amended by this later order.

And of course, it is not pretended that any permission was ever granted either to Schillin or his Committee to appear as *amicus curiae* in the Circuit Court of Appeals.

The present case, it is submitted, can be tried only as made up by the Transcript of Record. The Designation of Contents as requested by petitioner pursuant to Rule 75(A) of the Rules of Federal Procedure, in the District Court was duly filed (Tr. p. 30), and was duly served on the Assistant United States Attorney (Tr. p. 31). The latter made no Designation. This, it is submitted, closed the matter. No further designation could be made and no original documents of any nature could be filed in this Court, under the authorities above listed.

However, since the Affidavit and the documents attached to it have been actually filed, petitioner is presenting, as an Appendix hereto (see p. 10), a Motion that said Affidavit and the other documents originally filed with it in this Court, be considered as improperly filed, be not considered, and be ordered returned to the party who filed them.

———o———

The affiant Schillin says, at page 2 of the Affidavit, that he has "no personal animus whatever against petitioner".

This, although not important to petitioner, is difficult to believe, for this disbarment action filed eighteen years after the fact complained of, was instituted by the United States Attorney for the Fifth Circuit at the request of the affiant as shown by a letter from him of record in the District Court.

Further, the gratuitous announcement of the affiant that, in the face of the plain language of the State de-

cision he and his associates will deny "and continue to deny until a court of last resort of competent jurisdiction holds otherwise, that petitioner has been disbarred in the State Court solely because he had the misfortune of becoming mentally ill", demonstrates that his animus is so strong, that he declares himself absolutely unwilling to be bound by the holding of that very State Court of which he and his Committee declare themselves to be "an arm of the Supreme Court of Louisiana in all disbarment matters".

The very excerpt from the decision in Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 310, which is quoted in the Affidavit (page 3 of the Supplemental Memorandum) shows that, using highly emotional language, affiant and his colleagues complained that the State Court had not passed on their charge and allegation of misconduct. That excerpt actually shows that the Court refused to do so, saying "in view of the conclusion reached and hereinabove declared" (viz., that conceded insanity of itself and without willful wrongdoing was sufficient) "we need not determine the Committee's exception". Thus the Court, finally and definitely excluding from consideration, the Committee's charge of misconduct, declared that insanity eighteen years previous was the sole ground of petitioner's disbarment.

Of course, the State Court decree on that point is *res judicata* against the Committee. And affiant's vehement and turbulent protest in refusing to recognize this perfectly plain decision can be fairly construed in the present case as practically only a confession of judgment that the decree of the Circuit Court of Appeals, which stands

on nothing but on this erroneous and mistaken State Court decree (and which is all that affiant can stand on), unquestionably deprives petitioner, without due process of law, of his property right to practice his profession.

———o———

The affiant, in his argumentative affidavit, takes issue with the statement of petitioner's Opposition (page 3) that the disbarment of petitioner on account of illness, was especially reprehensible and lacking in due process, in a jurisdiction where disbarment depends on the Constitution and cannot be ordered for any ground except (as petitioner expressed it) willful misconduct. He charges petitioner with adding the adjective "willful", although it is difficult to conceive any actionable misconduct that is not willful. Indeed the charge of lack of due process herein is based precisely on a decree excluding willful or conscionable misconduct and based wholly on insanity.

But we do not have to argue this. The one, single Rule of the State Supreme Court (Article 13, Section 4, Charter of the Louisiana State Bar Association, Vol. 21, West's LSA Revised Statutes of Louisiana, page 380), which authorizes the affiant and his colleagues to bring actions for disbarment, specifically limits their right to sue to cases of "willful" misconduct. The Article reads as follows:

> "If, after investigation, a majority of the Committee shall be of the opinion that the member against whom the complaint has been made has been guilty of a violation of the laws of the State of Louisiana relating to the professional conduct of

lawyers and to the practice of law, or of a **WILLFUL** violation of any rule of professional ethics of sufficient gravity as to evidence a lack of moral fitness for the practice, it shall be the duty of the Committee to institute in the Supreme Court a suit for the disbarment or suspension of the accused member of the bar, and to designate one or more of their number to prosecute the same".

———o———

It must be remembered that the Solicitor General, when petitioner's application for writ of certiorari to the Circuit Court of Appeal for the Fifth Circuit was originally filed herein, filed a comprehensive Opposition and Brief, in which all the features of this matter were fully argued.

The prosecution of this case, under the applicable Federal law on appeals to this Court, rests in his able and experienced hands, and will be free from the unfortunate bitterness which must result because of the regrettable conditions which the appearance of the Bar Association as prosecutor will engender.

As shown by the affidavit filed, the only point which the Bar Committee presents is a claim of misconduct, which, however, is not in the case because it was eliminated by the State Court decree; which State Court decree, as rendered and as it stands, eliminating misconduct and resting exclusively on petitioner's illness twenty years ago, constitutes the only cause of action for this proceeding for disbarment in the Federal Court.

It is hoped that this Court will decline the Bar Committee's application, and further that, in due course, the decree of the Circuit Court of Appeals for the Fifth Circuit herein will be reversed.

Respectfully submitted,

DELVAILLE H. THEARD,
Petitioner,
Pro Se.

CERTIFICATE.

Copies of the foregoing Reply have been served on J. Lee Rankin, Solicitor General of the United States, and on M. Hepburn Many, United States Attorney for the Eastern District of Louisiana, by depositing said copies in the mail, postage prepaid, at New Orleans, on September 25, 1956. A copy has been sent also to James G. Schillin, affiant.

New Orleans, Louisiana, September 25, 1956.

APPENDIX.

Order.

Now comes Delvaille H. Theard, original defendant in this cause, and in this Court petitioner for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and respectfully shows to this Honorable Court that a certain affidavit by James G. Schillin, Chairman of the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association, together with original documents and a transcript of proceedings which form no proper part of the Transcript of Record in this cause, were improperly filed in this Court, also without notice to mover and on date or dates of which mover is unadvised.

And said Delvaille H. Theard, petitioner, now accordingly moves this Court to render its order that said affidavit and the other documents referred to, shall be considered as improperly filed and not forming part of the record on certiorari herein, shall be not considered, and shall be returned to the party who filed them in this cause.

TURN TO

NEXT CARD

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER DELVAILLE H. THEARD TO THE BRIEF OF THE SOLICITOR GENERAL OF THE UNITED STATES AND THE BRIEF OF THE COMMITTEE OF THE LOUISIANA STATE BAR ASSOCIATION.

DELVAILLE H. THEARD, Petitioner,

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REPLY TO THE BRIEF OF THE SOLICITOR GENERAL.

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(1)

So far as is known, and despite earnest research, there seems never to have been a decision, previous to the State Court decision herein, wherein an Appellate Court in this country has held that a lawyer should be disbarred where his insanity at the time of the act complained of was conceded by the Court, which refused to consider any other cause for disbarment 2

(2)

The present suit for disbarment, brought nineteen years after the act complained of, was stale and should have been dismissed. The State Court in its opinion, apparently believing that the only plea was one based on laches, gave little consideration to petitioner's plea of the prescription of ten years under an applicable State law. The matter of prescription was accordingly open in the present Federal case, and, under the well established rule, the State statute of limitations (Louisiana Civil Code, Article 3544) applied, and this suit should have been dismissed 4

(3)

The argument of the Solicitor General that State Courts have the power to interpret State statutes and that the Louisiana Supreme Court could interpret "insanity" or any other disease as "willful misconduct", is obviously unsound and arbitrary, and cannot serve to deprive petitioner of a property right guaranteed to him by the Fourteenth Amendment . . . 6

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(4)

The argument of the Solicitor General that the right of a lawyer to practice is only a privilege to be granted or withheld at the discretion of the licensing authority, overlooks the established doctrine that a lawyer's right to pursue his profession constitutes property protected by the due process clause of the Fourteenth Amendment, and of which the lawyer cannot be deprived for any whimsical, capricious or unreasonable cause 8

(5)

Wieman v. Updegraff, 344 U. S., 183, 97 L. Ed. 216, 73 Sup. Ct. 215, is controlling here, and the dissenting opinions of Associate Justices Black, Frankfurter and Douglas in Barsky v. Board of Regents, 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650, are also highly pertinent to the present case 10

(6)

The modern State has means other than disbarment for taking care of anyone who, through illness, might become a charge on the community or in any way dangerous to the public. And in any event, it is not suggested that the petitioner herein who was always a peaceful citizen, during his long years of illness ever needed the application of any measures, corrective or protective, in this regard 11

(7)

The elaborate monograph submitted by the Solicitor General as to the various disbarment rules in the several District Courts, although very informative and worthwhile. can have no an-

INDEX AND SUMMARY—(Continued)

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plication here. Petitioner, under the Rules of the District Court for the Eastern District of Louisiana, was called upon to show cause why the State Court decree should not be made executory, and if the said decree was null because rendered without due process in violation of the Fourteenth Amendment, it could not serve as the basis for any judgment in the Federal District Court 13

REPLY TO THE BAR COMMITTEE.

(8)

The proceedings in the Federal Court herein are based exclusively on the State decree. They must be limited to that issue, and cannot include any other attaeks which the members of the Bar Committee would like to make 14

(9)

The Bar Committee is in error when it declares that State v. Theard, 212 La. 1022, 34 So. (2d) 248, which decided that petitioner's acts, complained of, were not deliberate and intentional, but resulted from a condition of illness which he could not control,—is inapplicable here. On the contrary, that well-considered decision which refers to acts by petitioner of the same nature and during the period of petitioner's illness,—has as much authority and sanction as the Bar Committee and the Solicitor General would like to be able to accord to the State disbarment decision itself 14

Cases Cited: Page

Bank of Alabama v. Dalton, 9 How. 522, 13 L. Ed. 242 2

Barsky v. Board of Regents, 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650 11

Bealtz v. Burns, 8 Cranch. 98, 3 L. Ed. 500 8

Brebanan v. Warley, 245 U. S. 60, 62 L. Ed. 149, 38 Sup. Ct. Rep. 16 9

Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441, 35 Sup. Ct. 240 9

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. 18 9

Levy, In re, 348 U. S. 978, 99 L. Ed. 762, 75 Sup. Ct. 569 10

Louisiana State Bar Association v. Theard, 225 La. 98, 78 So. (2d) 310 1

Michigan Ins. Bank v. Eldred, 130 U. S. 693, 9 Sup. Ct. 690, 32 L. Ed. 1080 4

State v. Theard, 212 La. 1022, 34 So. (2d) 248 2

Selling v. Radford, 242 U. S. 46 13

Shepard v. Thompson, 122 U. S. 231, 30 L. Ed. 1156 8

Sheft v. Miller, 2 Wheat. 216, 4 L. Ed. 248 8

Stewart v. Bloom, 11 Wall. 493, 20 L. Ed. 176 5

Wieman v. Updegraf, 344 U. S. 183, 97 L. Ed. 216, 73 Sup. Ct. 215 10

IN THE

SUPREME COURT OF THE UNITED STATES

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We beg to refer, at the outset of this reply brief, to the disbarment decision by the State Court (Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 310) and also to another decision, of equal authority and sanc-

tion, of the same Court (State v. Theard, 212 La. 1022, 34 So. (2d) 248).

The decision first mentioned decrees that petitioner should be disbarred, not on account of any criminal act, the Court declining to give consideration to any such act as charged by the Bar Committee, but solely and only because of an act committed during a period of insanity, which the Court concedes for the purpose of the decision.

The opinion of the Court in the other case holds that the acts of petitioner, complained of, were neither "intentional nor deliberate", but were caused by some "unfortunate circumstance" (petitioner's mental condition and illness) "over which he (petitioner) had no control".

The present disbarment action in the Federal Court against petitioner was based entirely on the State Court disbarment decree which in effect conceded insanity and which confirmed the other decision holding petitioner free of culpable fault.

It would seem that this action accordingly wholly fails to disclose a cause of action, since it is based exclusively on two State Court decisions, one conceding petitioner's insanity, and the other completely relieving petitioner of all culpability due to the unfortunate circumstance of his illness,—a situation beyond his control.

REPLY TO THE BRIEF OF THE SOLICITOR GENERAL.

(1)

The Solicitor General, at page 11 of his brief, cites two cases to show that insanity of a lawyer is not a defense to an action for disbarment.

If the Court will turn to page 15 (Section 3) of petitioner's brief, it will be seen that the two cases cited by the Solicitor General and all the other cases cited by the Bar Committee were analyzed fully by petitioner. In each of these cases, although insanity was claimed by the defendant, it was proved to the Court that each lawyer-defendant suffered from no condition affecting his judgment and responsibility and that the lawyer-defendant's wrongdoing had been willful and deliberate.

In the present unique disbarment decision in the State Court, the insanity of petitioner at the time of the act complained of, was conceded by the Court, which, declining to hear any charge of misconduct as urged by the Bar Committee, entered the disbarment, not for any wrongdoing, but despite said insanity.

The State has other means than disbarment for the care of the insane and to protect the public. Already in 1935 the petitioner, realizing his enfeebled condition, had voluntarily withdrawn from the faculty of the Tulane Law School, where purely as a labor of love for the profession which he cherished, he had contributed sixteen years of part-time teaching of major subjects. From 1936 and for ten years thereafter, petitioner was constantly hospitalized and treated in various institutions. In 1948, completely restored to physical and mental health, he for six years thereafter practiced law unremittingly, arguing thirty-seven cases in the Louisiana Supreme Court and the Orleans Court of Appeal, with not one word of doubt, criticism or objection from the public generally or any Judge or attorney in the State. In 1954, despite his complete recovery and his renewed, unexceptionable profes-

sional activity, he was disbarred by the State Supreme Court, for an act committed in 1935, as to which the Supreme Court conceded his insanity and lack of willful wrongdoing at that time.

This State decision is the sole cause of action presented against petitioner in the instant proceeding for his disbarment in the Federal Court, and as a cause of action in this Court, it is clearly insufficient.

(2)

At page 9 of his brief, the Solicitor General says that the State Court decision on the statute of limitations was an authoritative pronouncement of State law binding in the Federal Court.

But the first requirement for the application of that doctrine is that there must have been a considered decision by the State Court on the point. The State Court in its opinion (State v. Theard, 222 La. 328, 62 So. (2d) 501), in a few vague remarks indicating that it believed that petitioner's plea had been limited to a charge of laches, did say that "our law of prescription is purely statutory", but did not even refer to Article 3544 of Louisiana Civil Code providing that, in every civil matter not subject to a special prescription, the prescription of that Article (ten years) shall apply.

Under Federal jurisprudence, where the cause of action is subject to be extinguished by prescription, the State statute applies and will be enforced by the Federal Court.

Michigan Ins. Bank v. Eldred, 130 U. S. 693, 9 Sup. Ct. 690; 32 L. Ed. 1080;

Stewart v. Bloom, 11 Wall. 493, 20 L. Ed. 176;
Bank of Alabama v. Dalton, 9 How. 522, 13 L. Ed. 242.

The Solicitor General, at page ten of his brief, says that the delay in bringing the disbarment suit did not prejudice petitioner's defense.

A delay of **seventeen years**—from 1936 when petitioner was hospitalized to 1952, when the State suit was started—and **of nineteen years** to 1954, when the present action was instituted, during the first ten years of which period petitioner was confined uninterruptedly as a patient and inmate in mental hospitals and completely removed from his former affairs and from all types of business activity whatsoever,—unquestionably and inevitably produced enormous and far-reaching changes in every aspect of petitioner's life. During that long period, petitioner's two professional associates died, as did petitioner's parents and, with one exception, all petitioner's other close relatives; his office and personal records were dispersed or destroyed, his books for the most part lost or stolen.

It is because of this unquestioned effect of inordinate delay in the pursuit of all matters, that doctrines of limitation necessarily came into being and were ultimately translated into every system of law. Statutes of limitation are statutes of repose. They are essential to the welfare of society. It is an axiom that the lapse of time constantly carries with it the destruction and disappearance of all means of proof. The public as well as individuals are interested in the principle upon which statutes of repose are based.

In the present case, the prescription or limitation of ten years was applicable, and the present action brought nineteen years after the act complained of, should have been dismissed for that reason.

(3)

The Solicitor General, also at page 9 of his brief, likewise argues that, since the State Court disbarred petitioner for insanity, whereas the State Constitution and the Rules of the Supreme Court (Charter of the Integrated Bar) limit disbarment, as authorized in the Constitution, only to "misconduct" or "willful misconduct", it must be concluded that the State Court, in the exercise of its undoubted power to interpret the State statutes, decided to include "insanity" within the definition, or as a form, of "willful misconduct".

Such an argument answers itself.

Nor can the Solicitor General argue that the Louisiana Court, in the exercise of its prerogative to interpret State statutes or in recognizing and applying the reserved police power of the several states, can by such means, unreasonably and at variance with fact and logic, destroy property without due process in violation of the Fourteenth Amendment.

It rests with the Federal Supreme Court to determine finally whether a State Constitution as declared by the State Court of last resort, or whether the acts of State officers and judicial and administrative proceedings had under State authority, are or are not consistent with due process of law. This is nothing more than a restatement

of the doctrine that the states cannot conclusively make due process anything they may choose to declare such, and that the inhibition of the Fourteenth Amendment rests upon the State in all its agencies and instrumentalities.

Further, the doctrine that the Fourteenth Amendment was not intended as a restriction upon the police power of the states is subject to the qualification that measures adopted for the purpose of regulating the exercise of **property rights, such as the practice of law,** must be reasonable and have some direct, real and substantial relation to the public object sought to be accomplished, and that the governmental power is not to be arbitrarily or colorably exercised or used as a subterfuge for oppressing and persecuting **any particular individual.**

Justice Frankfurter *(Barsky v. Board of Regents,* 347 U. S. at page 470; 98 L. Ed. 849, 74 Sup. Ct. 665):

> "It is one thing to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession . . . (p. 471). The limitation against arbitrary action restricts the power of a State 'no matter by what organ it acts'."

And Justice Douglas (with Justice Black concurring) *(Barsky v. Board of Regents,* 347 U. S., at page 472); 98 L. Ed. 850, 74 Sup. Ct. 666, said:

> "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed

as much right to work as he has to live, to be free, to own property. . . . The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. The Bill of Rights prevents a person from being denied employment who . . . . is wholly innocent of any unlawful purposes or activity. Citing Wieman v. Updegraff, 34 U. S. 183 . . .(p. 474)."

Shepard v. Thompson, 122 U. S. 231, 30 L. Ed. 1156;

Sheft v. Miller, 2 Wheat. 216, 4 L. Ed. 248;

Bealtz v. Burns, 8 Cranch. 98, 3 L. Ed. 500.

The argument of the Solicitor General that the right of a lawyer to practice is only a privilege to be granted or withheld at the discretion of the licensing authority, overlooks the established doctrine that a lawyer's right to pursue his profession constitutes property protected by the due process clause of the Fourteenth Amendment, and of which the lawyer cannot be deprived for any whimsical, capricious or unreasonable cause.

(4)

The Solicitor General claims at page 10 of his brief that insanity was a proper reason for removing petitioner from the practice of law. He adds that petitioner has never been found to be insane at the time of the act complained of. He urges, in any event, that no constitutional right was violated by the disbarment on the ground of insanity; and he concludes that petitioner was properly disbarred by the Federal District Court since he had been disbarred by the State in which said Federal Court sits.

As already shown in the present reply brief and also in petitioner's brief on the merits here, this hydra-headed attack of the Solicitor General clearly violates fundamental principles for the protection of **property** under the due process clause of the Fourteenth Amendment.

The alleged valid exercise of the police power does not lessen the power and duty of this Court to determine for itself whether a state statute, as interpreted by the State Court, violates the 14th Amendment.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18;

Brebanan v. Warley, 245 U. S. 60, 62 L. Ed. 149, 38 Sup. Ct. Rep. 16;

Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441, 35 Sup. Ct. Rep. 240.

The State disbarment decision (Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. (2d) 310) certainly adjudged the insanity of petitioner in the year 1935, as it conceded it for the purpose of its disbarment decree, holding that, despite said insanity and excluding the claims of the Bar Committee, petitioner must be disbarred for an act said to have been committed on January 2 of that year.

The real thought of the Solicitor General, as he has urged it over and over again, is that the right to practice law is a privilege which a Court can grant or withhold. The difficulty with that theory is that, under the settled jurisprudence of this Court, the right to practice law constitutes **property**, in the retention and enjoyment of which the lawyer must be protected, under the Fourteenth Amendment, to the same extent as in the use and enjoy-

ment of any other type of property. See the decisions in petitioner's Brief on the Merits, pages 15 to 18.

Indeed, a recent decision of this Court has settled that even the desire to enter into the practice and to obtain a license is a right protected by law and which cannot be thwarted by legislative or judicial blocks which are unreasonable and bear no substantial relation to the desired status. *In re Levy*, 348 U. S. 978, 99 L. Ed. 762, 75 Sup. Ct. Rep. 569; same case below 214 Fed. (2d) 331.

A mental breakdown which disabled petitioner for more than ten years, and from which he has now, nearly twenty-one years later, happily fully recovered, as demonstrated by his very active practice from 1948 to 1954 and by his conduct alone of the present suit from its incipiency,—offers no substantial support justifying the objection of the Solicitor General to petitioner's desire to continue to pursue his life's work as an attorney at law.

(5)

Wieman v. Updegraff, 344 U. S. 183, 97 L. Ed. 216, 73 Sup. Ct. 215, in refusing to remove from public employment certain professors who were ignorant of the subversive objectives and nature of an organization which they had innocently joined, is complete and controlling authority in the present case for the proposition that, "indiscriminate classification of innocent with knowing action must fall as an assertion of arbitrary power. . . . It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory".

At page 11 of his brief, the Solicitor General declares that, in his view, that case and the dissenting opinions of Justices Black, Frankfurter and Douglas in *Barsky v. Board of Regents*, 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650 are not comparable in importance, to the case now before this Court. In the *Wieman* case, this Court said:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on a disloyalty ground. In the view of the community, the stain is a deep one, indeed it has become a badge of infamy."

How strikingly parallel and, as we believe, even more serious and damning is a charge of professional misconduct resulting in disbarment; and how unjust, unreasonable and grievous to the former lawyer is such a decree when based not on conscious or willful misconduct but (excluding all other considerations as the State Court did in the present case) on a conceded mental breakdown which, as the same Court decided in a companion case already mentioned (State v. Theard, 212 La. 1022, 34 So. (2d) 248), did not involve any intentional or deliberate act but resulted from an unfortunate condition of serious illness which was beyond the lawyer's control at the time of the acts complained of.

(6)

The Solicitor General argues at page 12 of his brief that, as a matter of "judicial administration" it would be unwarranted, *i. e.*, undesirable in the view of the Solicitor, for a Federal Court to overturn the judgment below on the ground of abuse of judicial discretion.

We are not asking this Court to reverse the Court of Appeals or the Federal Judge on that ground.

It seems plain that the judgment of the District Court merely reflected the error of that Court's reliance on the validity of the judgment in the State Court; whereas it is patent, as we submit, that disbarment for conceded insanity, eliminating all other reasons or causes, is a deprivation of the lawyer's **property right in violation of the Fourteenth Amendment.** It is submitted that no such State Court decree can support a valid decree in this Court.

As already noted, the State has other means of taking care of those who through mental deterioration and breakdown are unable to take care of themselves or might become dangerous to the public. Happily, no such trouble has occurred in petitioner's case. It may be noted here that, for the full period of petitioner's illness, as well as during the previous years of his life, his mental condition reflected no personal eccentricities, conditions of contempt and abuse of Courts, opposition to the Government of our Country or leaning towards or adherence to any political theories or groups or movements properly under public condemnation in this country.

And this properly brings up the incontestable point that the Federal District Court and the United States Court of Appeals for the Fifth Circuit did not and could not change the cause of action as selected and presented by the United States Attorney. His motion asked for petitioner's disbarment in the Federal Court, for the sole reason that by a State Court decree which he attached, petitioner had been disbarred.

The case must stand or fall on that cause of action. The Court could hardly claim that proper judicial administration should not permit the reversal of the judgment of the District Court, as the Solicitor General abandoning the sole cause of action presented by the United States Attorney's motion herein, now suggests.

(7)

Also at page 12 of his brief, the Solicitor General says that the several Federal District Courts have adopted, each in its own District and in its discretion, different rule-patterns as to the method of disposal of disbarment decrees coming to them, as in the present case, from the State Courts.

A monograph prepared by the Department of Justice and no doubt of real value on this interesting subject, covers many pages of the Solicitor General's brief herein and is the basis for an informative and useful statistical table indicating the variations on the subject in eighty-three District Courts of the Federal Judicial System.

However, in *Selling v. Radford*, 242 U. S. 46, which the Solicitor General cites several times in his brief, it is settled that, as long as an overall rule such as we think the Solicitor General favors is not adopted, each Federal Court, in view of its own inherent powers, when the matter is not controlled by statute or the Federal Rules of Civil Procedure, is at liberty to make its own rules.

It goes without saying that the present case is controlled by the existing Rule in the Eastern District of Louisiana, reproduced in the brief of the Solicitor General, page 2.

The rule to show cause necessarily imports that the decree of the State Court is presented as the cause of action on which exclusively the motion of the United States Attorney is based.

That perforce is the only issue presented in the present case.

REPLY TO THE BAR COMMITTEE'S BRIEF.

(8)

The State Court decree, if it has any basis whatever, must rest on the plain statement of the State Court which, declining to consider any other charge or claim of the Bar Committee, **conceded the insanity** of petitioner at the time of the commission of the act complained of; the Court declaring that it made no difference "whether the dishonest conduct stems from an incapacity to discern between right and wrong, or was engendered by a specific criminal intent".

No one can add to this judgment, anything which the State Court declined to consider.

The Bar Committee, by its exception to the Master's Report, has emphasized the Court's refusal to include in its decision any charge of willful or felonious misconduct on the part of petitioner.

(9)

The Bar Committee, confronted with the ruling in State v. Theard, 212 La. 1022, 34 So. (2d) 248, that the acts of petitioner were **not intentional and deliberate** but occurred by reason of an unfortunate circumstance over which petitioner had no control, finds nothing to say, ex-

cept that that case and the State disbarment case are different.

Yet the acts in that case and in the disbarment case were exactly of the same nature, said to have been committed by petitioner at practically the same time, and the illness of petitioner prevailed throughout.

These two decisions of the same Court, especially in a jurisdiction where disbarment is limited by the State Constitution to "willful misconduct", demonstrate that the decree of disbarment of petitioner depriving petitioner of his right to practice law because he had been mentally ill some nineteen years previous, was whimsical, unreasonable and arbitrary, and, in clear violation of the Fourteenth Amendment, deprived petitioner of his **property right without due process of law.**

—o—

It serves no purpose for the Bar Committee to deny petitioner's insanity. That issue is out of this case. It passed out of the case, when the State Court, putting aside the Committee's charge of felonious conduct, and conceding insanity for the purpose of the judgment of disbarment, decided that, despite the insanity of defendant, a judgment of disbarment would be entered **on account of insanity.**

Inevitably, when the present case was instituted in the Federal Court solely on said State judgment as rendered, the only issue presented was the judgment itself. How can the Bar Committee in good faith now undertake to present any other issue by trying to add anything to the State Court judgment on which alone the United States

Attorney brought suit herein, especially when that very claim of the Bar Committee was put aside by the State Court which, in its judgment, chose instead to concede the **insanity** of petitioner for the purpose of its decision.

Petitioner, whose position and defense have been at all times constant, consistent and well founded in law, now requests and prays, for the reasons set forth in his previous briefs herein and in the present brief, that the judgment herein of the Circuit Court of Appeals for the Fifth Circuit be reversed and that the rule to show cause of the United States Attorney in the District Court in this cause be denied and discharged, and that petitioner, never found guilty of misconduct by any court, be protected under the Fourteenth Amendment, in his property right to practice his profession.

Respectfully submitted,

DELVAILLE H. THEARD, Petitioner,
In Propria Persona.

CERTIFICATE.

Copies of the foregoing reply brief have been served on J. Lee Rankin, Solicitor General of the United States, and on Louisiana State Bar Association, by depositing said copies in the mail, duly addressed, postage prepaid, at New Orleans, La., on December 7, 1956.

New Orleans, La., December 7, 1956.

DELVAILLE H. THEARD

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 893

DELVAILLE H. THEARD, PETITIONER

v.

UNITED STATES OF AMERICA[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The order of the District Court (R. 27–28) was entered without opinion. The *per curiam* opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 21–23) is reported at 228 F. 2d 617.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on Januray 6, 1956

[1] This caption seems incorrect since the United States has never been a party to the action. The proceedings in the District Court were captioned: "In Re Delvaille H. Theard, Disbarment Proceedings" (R. 1).

(Pet. App. 23). A petition for rehearing was denied on January 31, 1956 (Pet. App. 23). The petition for a writ of certiorari was filed on April 23, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTION PRESENTED

Whether the District Court for the Eastern District of Louisiana abused its discretion in ordering the disbarment of an attorney who, after notice and full hearing, had been disbarred from practicing law in the state courts of Louisiana for uttering forged documents while in an abnormal mental condition.

RULE INVOLVED

Rule 1 (f) of the General Rules of the United States District Court for the Eastern District of Louisiana provides in pertinent part:

> Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court, he shall be suspended forthwith from practice before this court and, unless upon notice, mailed to him at his last known place of residence, he shows good cause to the contrary within 10 days, there shall be entered an order of disbarment, or of suspension for such time as the court shall fix

STATEMENT

This action was commenced by a motion of the United States Attorney to suspend petitioner from practice in the United States District Court for the Eastern District of Louisiana in accordance with its Rule 1 (f), *supra* (R. 2). The motion was based upon an order by the Supreme Court of Louisiana striking plaintiff's name from the roll of attorneys and cancelling his license to practice law in Louisiana. *Louisiana State Bar Association* v. *Theard*, 225 La. 98, certiorari denied, 348 U. S. 832.

The state disbarment proceeding had been instituted by a petition filed by the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association (R. 3).[2] The petition charged that on January 2, 1935, he had forged a note for $20,000 which he had proceeded to notarize to make it appear authentic and then to sell for a valuable consideration (R. 4). Petitioner excepted to the maintenance of the proceeding, on the ground, among others, that at the time he had performed these acts [he] "was suffering from a mental illness which rendered him incapable of guilty or wilful conduct and deprived him of the ability to distinguish right and wrong".

[2] Prior to the institution of the proceeding, the Committee had conducted an investigation and hearing, at which petitioner was present and represented by counsel of his own choice (R. 4).

(R. 6).[3] The exceptions were heard by the Louisiana Supreme Court which held that insanity was not a bar to disbarment (222 La. 328, 335–336):

> * * * In disbarment, unlike criminal prosecution or a civil suit for recovery of money based on an offense or quasi offense, consideration of the interest and safety of the public is of the utmost importance for, whereas it may not be humane to punish by confinement to prison one who labored under the inability to understand the nature of his wrongful acts, it is quite another matter to permit such a person to continue as an officer of the court and to pursue the privilege of engaging in the honorable profession of counselor-at-law when he, by his misconduct, has exhibited a lack of integrity and common honesty. And in our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent.[4]

The Louisiana Supreme Court, accordingly, overruled petitioner's exceptions.

---

[3] In addition to insanity, petitioner pleaded prescription, laches and estoppel (R. 5).

[4] In the course of this opinion, the court noted that, in addition to the conduct specifically charged in the disbarment petition, petitioner had been involved in "peculations [which] involved thousands of dollars belonging to his clients and others extending over a considerable period of time," and that petitioner's counsel had himself submitted evidence as to "the public scandal and agitation attendant to the discovery of [petitioner's] embezzlements, forgeries and other breaches of trust * * *" (222 La. at 333–334, n. 2).

Following denial of petitioner's application for rehearing, the proceeding was set for hearing (R. 7). Petitioner then answered, reiterating the substance of his several exceptions including that of insanity, and his claim that the proceeding operated to deprive him of "the procedural due process guaranteed by Section 2 of Article 1 of the State Constitution, and by the Fourteenth Amendment to the Constitution of the United States" (R. 6–7). The Commissioner who had been appointed to take evidence (R. 7) found that petitioner admitted the commission of the wrongful acts (R. 8) but that "it must then, from the record, be held that [petitioner] was suffering under an exceedingly abnormal mental condition, some degree of insanity" (R. 8).[5]

When the proceeding was before it on the commissioner's recommendation of disbarment, the Louisiana Supreme Court again rejected the defense of mental illness in accordance with the view expressed in its earlier opinion (R. 10–11).[6] As to petitioner's claim of deprivation of constitutional rights, the court noted that the right

[5] It appears from the decision in *State* v. *Theard*, 212 La. 1022, 1027, that on December 13, 1937, petitioner applied for the appointment of a lunacy commission, that on April 20, 1938, he was held to be insane, and that he was declared sane on May 11, 1944.

[6] The court noted that its earlier ruling on the mental illness defense "appears to be logically sound; it is supported by competent authority; and no holdings to the contrary have been brought to our attention" (R. 11).

to practice law is not "property" or "a natural or constitutional right," but rather, a privilege or franchise, which once granted falls under constitutional protection, i. e., that "[b]efore a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense" (R. 15). This requirement, the court held, "has been fully met in the instant proceeding" (R. 15). Accordingly, the court ordered petitioner's name removed from its rolls, and cancelled his license to practice law in Louisiana (R. 16). This Court denied certiorari, 348 U. S. 832.

Following the entry of the state order, the present proceeding to disbar petitioner in the District Court for the Eastern District of Louisiana was instituted (R. 2). The order to show cause referred to the state proceedings, a copy of which was attached (R. 3–16), and directed, in accordance with Rule 1 (f) of the District Court, *supra*, that "unless [petitioner] shows good cause to the contrary within ten (10) days, an order of * * * disbarment * * * shall be entered" (R. 3). In response, petitioner urged *inter alia* that the Louisiana court had disbarred him "without just cause or reason and by a decree depriving him of his property without due process of law" (R. 18) and further that the decree of disbarment was based "on an act committed while [petitioner] was the victim of a mental breakdown,

utterly bereft of reason, and unable to distinguish between right and wrong" (R. 19). In so urging, petitioner advised that "if [he] had been disbarred because of misconduct intentional and reprehensible for any reason involving moral turpitude or wilful wrong, [he] would not now undertake to show cause why the decree of the Louisiana Supreme Court should not be operative and binding in [the District] Court" (R. 18).[7]

A hearing was had before the District Court at which petitioner offered no evidence (Pet. App. 23). Following the hearing, the District Court, without opinion entered an order directed that the rule be made absolute and that petitioner's name be removed from the court's roll of attorneys (R. 27–28). On appeal the Court of Appeals affirmed in a *per curiam* opinion (Pet. App. 21–23).

ARGUMENT

Accepting the rule that the District Court may properly direct his disbarment on the basis of a valid disbarment order of the Louisiana Supreme Court, petitioner seeks to utilize the federal court disbarment as a vehicle for obtaining another review, albeit collaterally, of the state court order. Petitioner's request for direct review of the state order has already been denied.

[7] Attached to petitioner's response was a list of the cases he had since 1948 argued in the Louisiana Supreme Court and the Court of Appeals for the Parish of Orleans (R. 25, 26–27).

No. 226, October Term, 1954, 348 U. S. 832. And since the errors in the state disbarment asserted here by petitioner are substantially the same as those advanced in No. 228, the indirect review now sought is *a fortiori* without warrant.

1. This Court has recognized that the federal courts in general do not conduct independent examinations for admission to their bars, but rely instead upon "confidence * * * in the bars maintained by the states of the Union." *In re Isserman,* 345 U. S. 286, 287–288, rehearing granted and petition for disbarment denied, 348 U. S. 1. And this Court has said, with reference to members of its own bar, that while a state court's order of disbarment "is not binding upon us, as the thing adjudged in a technical sense," yet "the necessary effect" of the state court's action, "unless for some reason it is found that it ought not to be accepted or given effect to, has been to absolutely destroy the condition of fair private and professional character, without the possession of which there could be no possible right to continue to be a member of this Bar." *Selling* v. *Radford,* 243 U. S. 46, 50. The Court there held that it would recognize "the condition created by the judgment of the state court" unless that court's procedure was wanting in due process or in proof, or unless "some other grave reason" existed which rendered acquiescence in the state court's view inconsistent with the principle that disbarment

must be based on "principles of right and justice." 243 U. S. at 51. Since, as we will show, petitioner was accorded due process and no "grave reason" was shown by petitioner, the District Court was within its power under its rules to accept the order of the Supreme Court of Louisiana. Indeed, such recognition of the state court's judgment as this Court has enjoined upon itself is called for with greater force in the case of a federal district court which not only serves substantially the same public as the state bar, but whose sole requirement for admission to its bar customarily is admission to the state bar. Surely, an unseemly conflict between such courts should be required only by the gravest of reasons.

2. Petitioner attacks the Louisiana disbarment primarily on the grounds (a) that it operated to deprive him of due process and (b) that his mental illness excused his misconduct and necessarily precluded disbarment. These interlocking contentions cannot withstand examination.

(a) It is undoubtedly true that the right of an attorney to appear and argue before a court, once granted, "is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency." *Ex Parte Garland,* 4 Wall. 333, 379. However, when there has been appropriate

notice and opportunity to defend—and the record here clearly shows that these rights were fully awarded petitioner (see the statement, *supra*) — the nonarbitrary determination of a court that the conduct of an attorney of its bar has constituted "moral or professional delinquency" does not present any question for review. As Mr. Justice Bradley wrote for this Court in *Ex Parte Wall*, 107 U. S. 265, 288–289,

> * * * the action of the court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. * * * This being so, the question whether a particular class of cases of misconduct is within its scope, cannot involve any constitutional principle.

(b) Moreover, the basis of the Louisiana order, i. e., that an attorney may be disbarred for improper actions even though taken during mental illness, accords with the accepted rule in other states. See e. g., *Re David Y. Patlak*, 368 Ill. 547; *Re Nicolini*, 262 App. Div. 114 (N. Y., 1st

Dept.); cf. *Re Vincent*, 282 S. W. 2d 335 (Ky.); *Re Manahan*, 186 Minn. 98, 101; *Re Bivona*, 261 App. Div. 221, 222 (N. Y., 1st Dept.); *Re Creamer*, 201 Ore. 343; *In Re Kennedy*, 178 Pa. 232.[8] Wilfulness would be relevant if disbarment were intended as punishment, but that is not its purpose. Rather, as the Louisiana court noted, (R. 10–11), it is ordered as a protection for the public, the courts, and the bar. *Ex Parte Wall*, 107 U. S. 265, 288. Accordingly, it is with the implications of the act rather than with its causation that the courts have been primarily concerned. Balancing the attorney's interest in his profession against the danger that his misconduct may recur and against the suspicion and scandal which may attach to the court and bar in the public mind, the courts have held that the dominant interest requires disbarment of the attorney. Even if one were to support the other position, the generally accepted view cannot be said to be unreasonable or without any foundation.[9]

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[8] Petitioner has cited no case which has held the contrary, and we have found none.

[9] Petitioner's further contention that the state proceeding was barred by laches and prescription since instituted seventeen years after the misconduct charged is belied by the facts that petitioner had been under interdiction until 1948, an earlier investigation had been deferred at his uncle's request because of petitioner's condition, and petitioner made no showing that the delay prejudiced the preparation of his defense. See R. 12–13.

CONCLUSION

For the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
JOHN J. COUND,
Attorneys.

MAY, 1956.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO PERMIT THE APPEARANCE OF THE LOUISIANA STATE BAR ASSOCIATION

The Chairman of the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association has prepared an affidavit in reply to certain statements made in petitioner's opposition to the motion to permit the appearance of the Louisiana State Bar Association, and has asked that this affidavit be filed with the Court. The affidavit is attached as an Appendix, *infra*, pp. 2–5. We take this opportunity to affirm that, without any "pressure" from or solicitation by members of the Grievance Committee, the Solicitor General requested the Committee to undertake the preparation of the brief and the presentation of the oral argument, if the Court should concur.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1956.

APPENDIX

AFFIDAVIT

STATE OF LOUISIANA,
PARISH OF ORLEANS,
CITY OF NEW ORLEANS.

BEFORE ME, undersigned authority, personally came and appeared JAMES G. SCHILLIN, Chairman, Committee on Ethics and Grievances of the Louisiana State Bar Association, who, being duly sworn, deposes and says that, relative to the opposition of Delvaille H. Theard, petitioner, to the request by the Solicitor General that the Bar Association be allowed to file a brief and make an oral argument in this case, the Committee cannot permit to go unchallenged the misstatements of fact contained in petitioner's opposition.

That the aforesaid Committee, which is an arm of the Supreme Court of Louisiana in all disbarment matters, has no personal animus whatever against petitioner; that said Committee in the discharge of its duty to the Court, the profession, and the general public, brought about the disbarment of petitioner, the State Court entering a unanimous decree, which decree is made a part of the present proceedings in the Federal Courts.

That the Disbarment Committee has denied and will continue to deny until a Court of last resort of competent jurisdiction holds otherwise, that petitioner has been disbarred in the State Court solely because he had the misfortune of becoming mentally ill. This is apparent from the following quotation from the State Court decision (72 So. (2) 315):

> "Petitioner herein (the above named Committee) excepts to that part of the Commissioner's report which holds that respondent 'was suffering under an exceedingly abnormal condition, some degree of insanity'. It alleges; in its exception, 'that, on the contrary, the evidence abundantly shows that he deliberately and consciously, and with malice of forethought, attempted to simulate and feign, and did so simulate and feign, the genuine signature of the alleged makers of the mortgage note, which he now admits was forgery.' However, in view of the conclusion reached and hereinabove declared, we need not determine the Committee's exception."

Notwithstanding this unambiguous finding, petitioner has the temerity to proclaim in his application to this Court for writs (p. 7, petitioner's application):

> "In other words, defendant was disbarred strictly and only because he had suffered, many years previously, (and despite complete recovery) from the illness of mental derangement."

The State decree has merely pretermitted the question of petitioner's sanity in resolving its final conclusion that insanity is not a defense in a disbarment action. The distinction is important for the reason that, if Your Honors conclude insanity is a proper defense to a Federal disbarment action, the issue of petitioner's sanity *vel non* remains yet to be adjudicated in the Federal Court.

That petitioner has indulged in certain gratuitous and baseless charges against the Committee, both in the Courts below and in his opposition to the Committee's appearance in this Court (pp. 2, 3, 4, petitioner's opposition), particularly in his unfounded assertion that the Solicitor General has been "pressured" by a few members of the Grievance Committee,

whereas the fact remains, as can be corroborated by the Solicitor General, that without solicitation the Committee has been requested, in event the Court concurs, to prepare the brief and make the oral argument before Your Honors.

The Committee was expressly requested by the United States Attorney to participate in the proceedings below, not as a formal party (for there are no formal parties in disbarment actions in the Federal Courts), but because of the Committee's acquaintance with the subject matter.

That the District Court did not permit Mr. Schillin, the Chairman of the Committee, to appear as an individual, as stated by petitioner, but expressly permitted the Committee through its Chairman, to appear, the Court making the following observation (p. 23 of the attached transcript of proceedings):*

> "THE COURT. * * * to give you (Mr. Theard) ten days in which to show cause why his name should not be removed from the role of attorneys authorized to practice before this court. In due course the matter came on for hearing. At that time, Mr. Theard appeared and argued in his own behalf. The United States Attorney's office was represented by Mr. Hepburn Many, Assistant United States Attorney and Mr. James G. Schillin *as a member of the Committee of Professional Ethics and Grievances of the Louisiana State Bar Association* also appeared and argued the matter as a friend of the court although at that time no formal order was entered authorizing Mr. Schillin to appear and argue before the court as a friend of the court. The court so considered his appearance. The court will now enter a formal order granting Mr. James G. Schillin of the Committee of Professional

*The transcript of proceedings has been lodged with the Clerk of the Court.

Ethics and Grievances the right to appear in this matter to assist the court therein." (emphasis ours).

That petitioner's suggestion (opposition brief, p. 4), that "the Chief Judge indicated marked astonishment at the presence of the Committee in the case" has no foundation in fact and is totally untrue.

That, merely to illustrate the further inaccuracies of petitioner's representations to this Court, we note that it is stated in his opposition to the appearance of the Committee (opposition p. 3) that under the State Constitution only *wilful* misconduct is a ground for disbarment whereas Your Honors will see that Louisiana Constitution, Art. 7, Sec. 10, Par. 1 (cited in petitioner's application, p. 4, and quoted as a footnote in his reply brief to the Solicitor General (p. 11)) makes no mention of the word "wilful," the provision being that the Supreme Court "shall have exclusive original jurisdiction in all disbarment cases involving *misconduct* of members of the Bar with power to suspend or disbar under such rules as may be adopted by the Court."

JAS G SCHILLIN,
Chairman, Committee on
Professional Ethics and Grievances
of the Louisiana State Bar Association.

Sworn to and subscribed before me this 5th day of September 1956.

MICHAEL M. IRWIN, *Not. Pub.*

U. S. GOVERNMENT PRINTING OFFICE 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD, PETITIONER

versus

UNITED STATES OF AMERICA

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONER

ISSUES PRESENTED

(1) The state court holding, that insanity is no excuse for professional misconduct, affords due process, and should be adopted in a federal disbarment action, considering that the profession of law is charged in the highest measure with a public interest, and that this Court has recently decided there is no vested right to practice law, the loss of the privilege being merely incidental to the right of the court to protect itself, and hence society, as an instrument of justice.

(2) A disbarment action filed four years after an attorney returns to practice is not stale, in the absence

of a showing of prejudice resulting from the previous delay; furthermore, the state rule is conclusive here.

STATEMENT

We agree that petitioner is entitled to an adjudication of his constitutional rights on the question decided by the Louisiana court, but we do not acquiesce in his unorthodox presentation of the issues.

In the state disbarment proceedings petitioner confessed to embezzlement and breach of trust committed against a client, Olga Wexler, in that on January 2, 1935 he forged her signature to a promissory note and on August 14, 1935 he appropriated to his own use the proceeds of the sale of said note. In resolving a purely legal issue, the state court held that his alleged insanity at the time these acts were committed was no defense in a disbarment action, or, in other words, that proof of intent or wilfulness was not essential considering the nature and real objectives of disbarment. Not content to have decided by this Court the restricted issue of whether this state holding offends due process, petitioner argues that he was actualy insane when these crimes were committed, which exculpates him from any ethical responsibility, and that he was sane at the time the state disbarment action was taken, as well as when this federal rule was filed. Petitioner further represents that in another earlier decision the Supreme Court of Louisiana exculpated him on account of insanity and then disbarred him for committing the same act.[1] This is not an accurate representation, because the court was dealing in each instance with an entirely different subject matter.

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[1] Petitioner says "the acts charged to petitioner in the two cases were the same" (pet. brief, p. 14).

Petitioner speaks of a "serious mental breakdown resulting from overwork," he quotes copiously from letters lauding him for his part-time service as a law professor, and expressing regret that his nervous condition necessitated his relinquishing his assignment—purely self-serving declarations beyond the scope of the state decision, and merely calculated to fortify his contention that he was actually insane when the offense was committed, yet petitioner opposed the Committee's appearance here because it would not "fairly limit its argument to the issues included in the present record" (pet. opposition, p. 1).

The Committee's contention that the evidence in the state hearing did not establish his insanity was treated thus by the state court (72 So. (2) 315):

> "Petitioner herein (the above named Committee) excepts to that part of the Commissioner's report which holds that respondent 'was suffering under an exceedingly abnormal condition, some degree of insanity.' It alleges, in its exception, 'that, on the contrary, the evidence abundantly shows that he deliberately and consciously, and with malice aforethought, attempted to simulate and feign, and did ~~not~~ simulate and feign, the genuine signature of the alleged makers of the mortgage note, which he now admits was forgery.' However, in view of the conclusion reached and hereinabove declared, we need not determine the Committee's exception."

We deny unreservedly that petitioner was insane when he committed the particular crimes for which he was disbarred,[2] or that any state court has so held, or that any

[2] His application for previous certiorari (Vide p. 5), refused when directed against the state decree, contained a similar inaccuracy.

state court has held he was insane at the time the other alleged embezzlements or breaches of trust were perpetrated. Nor has any such conclusion been reached in this federal proceeding.

By a denial of petitioner's application for writs when directed against the state court decree* his disbarment in Louisiana is final and irretrievable. Should this Court hold that a defense of insanity when the misconduct occurred is sufficient to defeat a disbarment action in the federal courts, this cause should be returned to the court below in order for the question of petitioner's sanity *vel non* to be adjudicated. The distinction, therefore, between petitioner's contention that his insanity has been established and our position that it has merely been pretermitted by the state court is at once apparent.

Petitioner proclaims that he has abundantly established that his sanity is now fully restored and that there is now lacking the primary object of disbarment, which is to protect the courts, the profession, and society itself. Considering the public interest which permeates a matter of this kind, we can only say that this record does not contain the quality of proof necessary to reach that conclusion.

SUMMARY OF ARGUMENT.

(1) The choice of who shall stand at the bar rests with the state. In interpreting its constitution and rules governing disbarment, the state court has determined that an attorney who confessed to forgery and embezzlement committed against his own client is guilty of misconduct warranting disbarment, although, for the

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Theard v. Louisiana State Bar Association, 348 U.S. 832, 75 S. Ct. 54, 99 L.Ed. 656.

purpose of the holding, it was conceded he was insane when the acts were committed. That petitioner is guilty of misconduct under the law and public policy of the state is conclusive here. This Court's denial of *certiorari* against the state decree has made his disbarment complete and irretrievable in the state court.

(2) Considering vital matters of public policy—that the profession is charged in the highest measure with a public interest; that this Court has recently held an attorney has no vested right in his license, rather that the court should protect itself, and hence society, as an instrument of justice; that the objective of disbarment is not to punish the attorney, whose loss of status is incidental and consequential,—the Louisiana rule disbarring petitioner, notwithstanding the court conceded his insanity for the purpose of the decision, does not offend due process. There is nothing unique in imposing civil liability without actionable fault, where the public interest is paramount.

(3) As the state court has not decided petitioner was actually insane when he committed the crimes for which he was disbarred, if petitioner's defense is held to be valid in the federal courts, the case must be returned for adjudication of the issue of his actual insanity when the offense occurred. The disbarring authority, state or federal, must determine that issue for itself on satisfactory evidence; the same is true with reference to the issue of his present sanity. Petitioner must fail in his effort to have any court conclude he was actually insane when he committed the offense for which he was disbarred because a *nisi prius* court held he was insane at the time he was brought to trial on an entirely different charge.

(4) A state disbarment action filed four years after petitioner returned to active practice is not stale, considering the protracted period petitioner claims to have been hospitalized. The state decision on both the law and the facts being adverse to petitioner, the issues are foreclosed here. Since petitioner has shown no prejudice by the delay, the federal rule should be the same as that ordained by the state.

ARGUMENT

We reply as follows to petitioner's argument as catalogued in his brief:

(1)

The Supreme Court of Louisiana has exclusive original jurisdiction involving misconduct of members of the bar; the constitution does not limit the grant to wilful misconduct; there was no lack of jurisdiction *rationae materiae* in the state court.

Petitioner confessed to the misconduct for which he was disbarred. A plea that his alleged insanity at the time of the offense effected an ouster of the court's substantive power to hear the case was denied.[4] (*Louisiana State Bar Association* v. *Theard*, 222 La. 328, 62 So. (2) 501, 503.) That holding is conclusive here. Furthermore, the argument is otherwise untenable.

The state court, with plenary authority and jurisdiction to construe its own rules for disbarment, has held petitioner to have been guilty of misconduct, sufficient to justify disbarment, notwithstanding in making its decision the court conceded his insanity at the time the

[4] This point that the state court lacked jurisdiction *rationae materiae* was not saved in petitioner's application for certiorari, and will not be considered. Rules S.Ct. U.S. Rule 23(c).

misconduct was committed. Petitioner complains here that, under the law of Louisiana, the offenses of forgery and embezzlement, to which he confessed at the disbarment hearing, do not constitute misconduct under the law of Louisiana in view of his particular situation.[5] That issue has been settled adversely to him by the Supreme Court of Louisiana, and that court's interpretation of their own rules is conclusive here (*Barsky v. The Board of Regents*, 347 U.S. 442, 32 L.Ed. 829, 74 S.Ct. 650, 654). The responsibility for choice as to the personnel of its bar rests with Louisiana (*In Re: Summers*, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795).

(2)

The state rule in the disbarment decision, which decision pertained to a particular forgery and embezzlement, is not at variance with an earlier decision in which the court made reference, in passing, to petitioner's insanity at the time of trial for another embezzlement and which delayed his criminal prosecution therefor, the other embezzlement being separate and distinct from the offense for which he was disbarred. The two decisions deal with entirely different issues.

The *Wexler* forgery for which petitioner was disbarred occurred in 1935. Significantly, all of his offenses consisted of breaches of a fiduciary trust, the symptoms of his alleged insanity being solely "a penchant for keeping the money of others without render-

[5] Although there is nothing in the constitution or statutes prohibiting an insane person from holding public office, and it is not so declared by the common law, nevertheless on grounds of public policy an insane person cannot hold public office (*Matter of Killeen*, 201 N.Y.S. 209, 121 Misc. 482).

ing services or account therefor" (*Louisiana State Bar Association* v. *Theard*, 62 So. (2) 504):

We quote from the above decision of the state court, at page 503, as follows:

> "Incidentally, the peculations involved thousands of dollars belonging to his clients and others extending over a considerable period of time. In the petition, the charge has been limited to a single instance of forgery and uttering. However, counsel for respondent introduced in evidence newspaper clippings and other documents relative to the public scandal and agitation attendant to the discovery of respondent's embezzlements, forgeries and other breaches of trust, his arrest and subsequent incarceration in a sanitarium for mental diseases where he remained for a long time."

His first arrest came on August 4, 1936 as a result of an embezzlement charge by Georgine Denis Merrill,[6] thus bringing to light these offenses. When he was brought to trial in the Criminal District Court for the Parish of Orleans on this Merrill charge on April 30, 1938, which was, of course, three years after the commission of the offense for which he was disbarred, he was adjudged "presently insane," which concerned only his then inability to defend himself or to assist his counsel in his defense. The state disbarring authority did not absolve him from the criminal consequences of an act of misconduct, and then subsequently deprive him of his live-

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[6] *State* v. *Theard*, 203 La. 1026, 14 So. (2) 824, involves Mrs. Merrill's transaction. While her name does not appear in the decision, the bill of information was filed on August 11, 1936, and her identity is made clear in *State* v. *Theard*, 212 La. 1022, 34 So. (2) 248.

lihood because of the commission of the same act. The state court, in the disbarment action, was concerned only with misconduct committed in 1935 and the Merrill criminal proceeding related in not the slightest degree to insanity at the time the Merrill alleged misconduct was committed, but to his mental condition which prevented his being brought to trial.[7] Since petitioner now claims to have been insane at the time he committed all of these crimes, it is natural to suppose he would have pleaded insanity as the reason for the alleged embezzlement to the Merrill case, yet after the "insanity" impediment had been removed on May 11, 1944 in this very Merrill case, he was acquitted by a jury on his simple plea of not guilty, which precluded any jury finding that he was insane when the act occurred.

It is significant that, although on April 30, 1938 he contended he was unable to defend himself on the ground that he was then insane (which impediment was not removed until May 11, 1944),[8] petitioner was before the District Criminal Court on March 29, 1943, the same day on which he was being hospitalized as an insane person,[9] seeking to be dismissed from the Merrill charge on the ground that the state's failure to bring him to

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[7] Judges have nothing to do with the question of sanity or insanity at the time of the offense, because that is a question of fact on which depends the accused's guilt, which the jury alone must decide. The question of "present insanity" of a party accused of crime is a question which determines whether he is capable of defending himself, or of rendering assistance to the attorney or attorneys defending him. That question, of course, has nothing to do with the question of guilt of the party accused and is therefore a matter for the judges and not the jury to decide (*State* v. *Neu*, 180 La. 545, 157 So. 195, 115).

[8] *State* v. *Theard*, 212 La. 34 So. (2) 248, 249.

[9] Pet. brief, p. 7.

trial was barred by a three-year statute of limitations (*State* v. *Theard*, 203 La. 1026, 14 So. (2) 824).

True, petitioner avoided further prosecution on the Phoenix Building and Homestead embezzlement charge (*State* v. *Theard*, 212 La. 1022, 34 So. (2) 248) because of the state's failure to timely bring him to trial, but he has never been adjudicated insane when these offenses were committed.

Patlak, infra, holds that a previous finding in a criminal case that an attorney was insane at the time he committed other misconduct was not *res judicata* in, nor did operate as an estoppel against, a disbarment hearing involving another offense committed at another time.

A finding by a judge in 1938 that petitioner was unable to defend himself against one criminal charge does not establish his insanity in 1935 when he committed the crime for which he was disbarred. The disbarring authority, state or federal, must decide on the evidence produced in a disbarment hearing whether an attorney was insane when he committed an act of misconduct, not on the conclusion of a *nisi prius* court, which may have dealt with entirely different evidence.

(3)

The state court ruling that insanity is no defense in a disbarment action is not unique, and petitioner can point to no authority to the contrary.

An annotation to the *Patlak* case will be found in 116 A.L.R. at page 632 where the editor properly notes that "no authority (except the dictum in the *Kennedy* case, 178 Pa. 232, 35 Atl. 955) has been found for regarding an attorney's insanity as being a mitigating circum-

stance." In the matter of *Manahan*, 186 Minn. 98, 242 N.W. 548, the court said that mental instability at the time of the offense does not justify the court in taking chances that, were he again permitted to practice, relapses might run during which clients in the future would suffer as in the past (116 A.L.R. 633).

The Louisiana doctrine, announced in both decisions dealing with petitioner,[10] applied *Patlak*, 368 Ill. 547, 15 N. E. (2) 309, where the insanity at the time of the offense was conceded for the purpose of the holding. Of course, **the testimony on that score was conflicting, just as it is here.** Patlak's sanity at the time of disbarment was furthermore admitted by the court. His defense was "that, at the time the respective transactions took place about which complaints were made and prosecuted, he was insane, hence he did not know what he did and cannot be disbarred for anything he did while he was insane," just as is petitioner's defense.

This contention was rejected and petitioner can point to no authority to the contrary.

(4) (5) (6) (7)

The state rule that insanity is no defense in a disbarment action is not so unreasonable or arbitrary as to offend any right protected by the Fourteenth Amendment.

The state court has so decreed, and the immediate issue is whether the holding is so offensive to due process that it will be denied recognition in the federal courts.

That the profession of law is one charged in the high-

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[10] *Louisiana State Bar Association* v. *Theard*, 222 La. 328, 62 So. (2) 501, and 225 La. 98, 72 So. (2) 310

est measure with a public interest must be conceded.[11] Unlike members of the other professions, a lawyer is an officer of the judiciary,[12] he takes an oath to demean himself uprightly and according to law (S. Ct. Rule 5(4)), and he plays a sacred role in the administration of justice. The power to admit and disbar is essentially judicial,[13] not legislative; statutes have been struck down which are in limitation, rather than in aid, of its experience. It is not too much to say that the peace and well-being of the state and nation depend upon a continued supervision of the practice of law. The public has almost as deep interest in the integrity and the independence of the bar as of the bench.[14]

It is in this atmosphere that the state court has removed petitioner from the rolls, by balancing on the one hand the devastating effect of his misbehavior on the judiciary, the legal profession—indeed on society itself—against on the other hand the loss of his status as a lawyer. Petitioner complains he did not know what he was doing, that his conduct was not wilful. The Supreme Court answers that the public must be protected against his activities in the practice of law whether or not he knew what he was doing (62 So. (2) 504). The same rule should be recognized in the federal courts.

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[11] *Ex parte Burr*, 22 U.S. 529, 9 Wheat 529, 6 L.Ed. 152; *Booth* v. *Fletcher*, 101 F. (2) 676, cer. denied 307 U.S. 628, 59 S.Ct. 835, 83 L.Ed. 1511; *Ex Parte Wall*, 107 U.S. 265, 288.

[12] By statute in Louisiana, attorneys are characterized as public officers along with other persons connected with courts of justice, such as judges, advocates, clerks and sheriffs (*Art. 2447, Revised Civil Code*).

[13] *Ex parte Secombe*, 60 U.S. (19 How.) 9, 15 L.Ed. 565; *Randall* v. *Brigham*, 74 U.S. 523, 7 Wall. 523, 19 L.Ed. 285.

[14] Cfr. *Cammer* v. *United States*, 76 S.Ct. 456.

We understand this is but an application of the doctrine recognized by *Isserman*, 345 U.S. 286, 73 S. Ct. 676, 97 L. Ed. 1013, to which decision no allusion is made by petitioner.[15] The attorney was disbarred in New Jersey because of his conviction by the Southern District of New York for contempt. Proceeding was brought here to disbar him (Rules S. Ct. Rule 2(5), 28 U.S.C.A.). To his claim that he had already been sufficiently punished, and that his total expulsion constituted vindictiveness, Your Honors replied:

> **"Such an attribute misconceives the purpose of disbarment. There is no vested right in an individual to practice law. Rather there is a right in the court to protect itself, and hence society, as an instrument of justice. That to the individual disbarred there is a loss of status is incidental to the purpose of the court and cannot deter the court from its duty to strike from its rolls one who has engaged in conduct inconsistent with the standard expected of officers of the court."**

The dissent in *Isserman* rejected a doctrine that conviction for contempt is *per se* a ground for disbarment, and indicated that the result might have been different if a conspiracy to impede the administration of justice were involved.

Wieman v. *Updegraff* [16] dealt with the field of public education wherein the court, in considering the basic nature of the act denounced and its relation to the maintenance of high educational standards, concluded that it was arbitrary state action to oust a professor merely because of his refusal to swear that he had not been a

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[15] It was cited against petitioner below.

[16] Cfr. *In re: Summers*, *supra*, which involved a lawyer's oath.

member of a subversive organization. If the state rule had provided that a teacher should be dismissed for **overt acts** involving moral turpitude, as in petitioner's case, the result might have been different. We detect nothing in *Wieman* or in the dissents in *Barsky, Adler,*[17] and other decisions, to invalidate a rule that ousts a teacher, not for mere association, not because he thought differently than a transient majority, or even advocated an unpopular cause, but because he had been found guilty of **immoral deeds**[18]—not words—committed in the actual pursuit of his profession, notwithstanding he did not know what he was doing because of an emotional instability.

Whatever the rule is in the area of public education, in the field of the law Your Honors have said in *Isserman* that petitioner has no vested right and that the public interest is paramount. That he has no natural right to his license, nor is it a privilege or immunity in the constitutional sense was recognized *In Re: Lockwood*, 154 U.S. 116, 14 S. Ct. 1082, 38 L. Ed. 929.[19] Louisiana's holding that petitioner, having been extended this high privilege with knowledge that he had no vested right in it and that the state could withdraw it under precepts calculated to protect society itself

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[17] *Adler* v. *Board of Education*, 342 U.S. 485, 72 S. Ct. 380; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754.

[18] *Meffert* v. *Packer*, 25 S.Ct. 790, 195 U.S. 625, 49 L.Ed. 350.

[19] *Exparte Garland*, 4 Wall. (71 U.S.) 333; *Bradwell* v. *Illinois*, 16 Wall. 130, 83 U.S. 130, 21 L.Ed. 442; *Ruckenrood* v. *Mullins*, 133 P. (2) 325, 102 Utah 548, 144 A.L.R. 387; *Watson* v. *Employers Liability*, 348 U.S. 65, concurring opinion of Mr. Justice Frankfurter; *Simmons* v. *Smith*, 149 F. (2) 869; *Starr* v. *State Board*, 159 F. (2) 305; *In Re: Thatcher*, 190 F. 969, 212 F. 801, appeal dismissed, 36 S.Ct. 450, 241 U.S. 644, 60 L.Ed. 1218; *People* v. *Baker*, 311 Ill. 66, 142 N.E. (2) 554, 31 A.L.R. 737; *In Re: Berkurtzk*, 323 Mass. 41, 80 N.E. (2) 45; *Matter of Keenan*, 314 Mass. 544, 546, 50 N.E. (2) 785.

from abasement and destruction, affords due process, although as a consequence of the necessity to protect the public he has suffered loss of status for offenses not wilful because of his alleged insanity.

Reliance is placed on three dissenting opinions in *Barsky* which condemned the expulsion of a New York physician for reasons non-existent here, where dissenting Justices found use of illegal evidence; conviction of a crime not involving moral turpitude by an agency with intermingled legislative-executive-judicial arbitrary power; and where Mr. Justice Frankfurter concluded a doctor's failure to produce books and records before a legislative committee bore no possible relation to his "fitness, intellectual or moral to pursue his profession," meaning, we assume, that the misconduct was not committed in the pursuance of his profession. An attorney goes far afield to assert that such language applies to forgery and embezzlement committed against his own client while actually representing her in the practice of law.

Civil liability may be imposed and rights may be disrupted without proof of actionable or wilful fault. The instances are many and varied. The determination of whether a State has taken property without due process consists in balancing the hardship placed on the individual on the one hand against the benefits which accrue to the public as a whole on the other hand (*State* v. *Marin,* 111 P. (2) 651, 17 Cal. (2) 699). The regulating authority in the field of law is at least as extensive, if no more so, than the police power. The state agency may for the general welfare of society impose obligations or responsibilities otherwise non-existent; and the creation of such liability even though imposed irrespective of fault is not violative of due process if it

rests on reasonable grounds of policy (*Chicago* v. *Sturges*, 222 U.S. 313, 32 S. Ct. 92, 56 L. Ed. 215; *Bisphan* v. *Mahoney*, 175 A. 320). Workmen's Compensation acts have been sustained even though they result in imposing liability without fault (*Cudahy Packing Co.* v. *Parramore*, 44 S.Ct. 153, 263 U.S. 418, 68 L.Ed. 316; *Mountain* v. *State of Washington*, 37 S.Ct. 260, 243 U.S. 219, 61 L.Ed. 685).

Although the rule is different in Louisiana, an insane person is liable for his torts at common law; the liability is in no way dependent upon the intent or design to commit the act (*Holdom* v. *Grand Lodge*, 159 Ill. 619, 43 N.E. 772; *Shedrick* v. *Lathrop*, 172 A. 630); an ordinance is constitutional which proscribes a visit to a place where gambling implements are exhibited, though it authorizes conviction for an innocent visit (*Ah Sin* v. *Wittman*, 25 S. Ct. 756, 198 U.S. 500, 49 L.Ed. 1142); a statute imposing liability for reasonable attorney's fees when payment of an insurance policy is wrongfully refused is valid, though the refusal is in good faith (*Life & Casualty Ins. Co.* v. *McCray*, 54 S. Ct. 482, 291 U.S. 566, 78 L.Ed. 787). A corporate insider may be disgorged of profits in shortswing transactions in securities irrespective of his intention when he entered the stock transaction (Sec. 16 (b) Securities Exchange Act of 1934, 15 U.S.C. 78 p. (b); *Smolowe* v. *Delendo Corp.*, 136 F. (2) 231, cert. denied 320 U.S. 751); absolute tort liability is not *per se* invalid as a deprivation of due process (*Prentiss* v. *National Airlines*, 112 F. Sup. 306; *Sandstrom* v. *California*, 189 P. (2) 17, 31 Cal. (2d) 401, 3 A.L.R. (2) 90, certiorari denied 69 S.Ct. 31, 335 U.S. 814, 93 L.Ed. 369); any loss resulting from such regulation is merely consequential (*Brown* v. *Warner*, 50 F. Sup. 593; *Pennsylvania* v.

Board, 81 A. (2) 28, 13 N.J. Super. 540, Affirmed 83 A. (2) 774, 8 N.J. 85).

(8)

The federal disbarring authority should require conclusive evidence of petitioner's present sanity, which was impliedly held immaterial in the state court.

There was no adjudication in the state court relative to petitioner's mental condition in 1952 when this action was filed. Apparently the court having rejected the defense of insanity, considered it immaterial that petitioner may have regained his sanity. The court relied on *Patlak* which conceded the attorney's present sanity, and which applied *Manaham* (Vide 116 A.L.R. 633), the latter decision holding that the court would not take chances on a relapse.

Petitioner says no one can question his complete recovery in body and mind or claim seriously and in good faith that he is not in every way competent and responsible to practice in the courts of the United States. For fear the Committee may be said to have acquiesced in these statements of fact, our duty compels us to say that there is substantial evidence to the contrary in the state proceeding, some offered by petitioner himself, not considered by the state court on account of the doctrine upon which the case was disposed of.

Assuming he relies on the present record, the following appears in his answer to this federal rule (R. 18):

"Appearer, Theard, with great industry has since 1948 practiced his profession, **as quoted by the Supreme Court at p. 4 of its opinion** 'without any

complaint levelled at his conduct.' " (Emphasis writer's)

Petitioner, in his application for rehearing in the Court of Appeals (p. 14) declares:

> "When in 1948 appellant's health was completely restored and his civil interdiction lifted, appellant resumed active practice and, from 1948 to 1954, in addition to countless *nisi prius* cases, argued thirty-seven cases on appeal in the Supreme Court of Louisiana and in the Court of Appeal, for the Parish of Orleans (R. 26), **as the Supreme Court of Louisiana notes** 'without complaint levelled at his conduct.' " (Emphasis writer's)

From these declarations by petitioner, undoubtedly inadvertently made, it appears that the state court has found as a fact that, for the stated period, he has practiced law without complaint, whereas the language "without complaint levelled at his conduct" is petitioner's own language, contained in his own pleading in the state court and copied verbatim by the court. The decision of the Supreme Court of Louisiana contained in 72 So. (2) at p. 312 establishes this without doubt.

Petitioner's answer to the instant federal disbarment rule was filed on May 29, 1954. He alleged (R. 14) that he has recovered from his previous mental infirmity and his health is again entirely normal. No evidence under oath was offered by him to support these averments, petitioner being content to rely on decisions in the record (R. 19), showing his activities since his return to the practice in 1948. If this is proof positive

of his sanity, we need only refer to a similar list on pp. 23-24 of our appendix to demonstrate his intellectual and professional accomplishments during a time when he claims he was insane to fortify the Committee's contention throughout that he was never so bereft of reason that he did not know the difference between right and wrong.

Considering his solemn representations in this federal action of his complete insanity for a period of ten years, four months, and twenty-three days—from September 2, 1936 until February 25, 1947,[20] petitioner should have tendered more convincing proof of his present mental fitness if it is held to be an issue here. A bare statement by the state court (62 So. (2) 504) that his civil interdiction terminated on May 7, 1948 should hardly satisfy any disbarring authority that petitioner had regained the mental and moral attributes so necessary to the practice of law. A decree from a *nisi prius* court lifting his interdiction would evidence nothing more than his capacity to perform any act which any **layman** might perform.

Petitioner's admission that the true objective of disbarment is to protect the public, and not punish a lawyer,[21] is a complete recognition of the doctrine of *Isserman* that he has no vested right in his license, and of the validity of the basic reasoning in the state court decision that insanity is no defense to a disbarment action. Under the doctrine of those decisions it is immaterial that he may be presently sane.

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[20] Pet. brief, p. 7.

[21] It is for this reason that lawyers are permitted to resign in certain instances (*Application of Harper*, S.Ct. Fla. 84 So. (2) 700).

(9) (10)

The state court holding that the disbarment action was not stale is conclusive, and presents no substantial federal question.

The state court gave petitioner every opportunity to show prejudice because of the period which elapsed before the action was taken. This he could not do. As petitioner did not resume the active practice until 1948, a disbarment action filed in 1952 is timely. At all events the state court gave cogent reasons [22] for its policy, and petitioner has not shown the rule to be unreasonable or arbitrary. No federal question is present here, and there is no basis for applying a different rule in the federal courts in this case.

CONCLUSION

For these reasons this committee prays that the judgment below be affirmed or, in the alternative, that the cause be remanded to determine the issue of petitioner's actual insanity when the misconduct occurred as well as his mental condition when this federal disbarment rule was filed.

Respectfully submitted,

COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES OF THE LOUISIANA STATE BAR ASSOCIATION,

JAMES G. SCHILLIN,
Chairman.

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[22] *Louisiana State Bar Association v. Theard*, 62 So. (2) 504 and 72 So. (2) 314.

The Supreme Court of Louisiana has exclusive jurisdiction in all disbarment cases involving misconduct of members of the bar, with the power to suspend or disbar under such rules as may be adopted by the court. There is no requirement that the misconduct shall be wilful (*Constitution of Louisiana, West's L.S.A. Constitution,* Vol. 2, p. 63, Art. 7, Sec. 10).

Under this constitutional rule making power the Supreme Court of Louisiana adopted comprehensive rules to govern "discipline and disbarment of members," which are fully contained in *West's L. S. A. Revised Statutes,* Vol. 21, p. 377, et seq., providing it shall be the duty of the Committee to institute disciplinary action whenever "the member against whom the complaint has been made **has probably been guilty of a violation of the laws of the State of Louisiana relating to the professional conduct of lawyers and to the practice of law,** or of a wilful violation of any rule of professional ethics of sufficient gravity as to evidence a lack of moral fitness for the practice of law." As no law exists in Louisiana regulating the practice of law, or the professional conduct of a lawyer, as such, there is ample area for the interpretation, and the court may have well so concluded, that since petitioner confessed that he was "guilty of a violation of the laws of the State of Louisiana" denouncing forgery and embezzlement, proof of wilfulness was unnecessary. At all events the interpretation of its own rules was for the Louisiana court.

The procedural requirements of the rules were meticulously followed in petitioner's case. He was represented by competent counsel before the Committee, who cross-examined the witnesses, and the Committee's power of subpoena and otherwise were available to and utilized by him. Pursuant to the rules, a hearing was had before a commissioner, which were adversary in

every respect. He was represented by counsel before the Commissioner as well as before the Supreme Court, which rendered two opinions, one on exceptions (62 So. (2) 501), and one on the merits (72 So. (2) 310).

The rule relative to reinstatement of disbarred attorneys reads as follows (*West's L.S.A. Revised Statutes*, Vol. 21, p. 389):—

> "When a petition for reinstatement shall have been filed by a member disbarred from the practice of law by judgment of the Supreme Court, a copy thereof shall be served upon the secretary-treasurer of this association, and the committee, acting through one or more of their number, may appear in the proceeding either for the purpose of supporting or opposing said petition."
>
> * * * * *

L.S.A. C.C. Art. 2447: Sale of litigious rights:

> "**Public officers** connected with courts of justice, such as judges, advocates, **attorneys,** clerks and sheriffs, can not purchase litigious rights, which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity, and of having to defray all costs, damages and interest."
>
> * * * * *

The record (R. 19) contains a list of thirty-six (36) cases argued by petitioner during the **six-year period** after his resumption of practice, that is, from May, 1948 until April 26, 1954, when his disbarment became final. He contends that such activity shows his complete restoration to health of body and mind.

This Wexler forgery occurred on January 2, 1935. If petitioner is correct in this respect, we point to the following list of seventeen (17) cases argued by him during the much shorter period of less than

two (2) years prior to his arrest in August, 1936, that is, from October, 1934 to June, 1936, as evidence of his intellectual competency and professional accomplishments. Yet during this period he says he was insane.

(1) *Cabral* v. *Victor and Provost*, 181 La. 139, 158 So. 821. This decision by the Supreme Court of Louisiana was rendered on October 29, 1934 and petitioner's application for rehearing was denied on November 26, 1934. This was only approximately one month before he forged the *Wexler* note on January 2, 1935. If his ability to prepare and argue cases is a criterion of his sanity he was sane then. Petitioner succeeded in obtaining a rehearing.

(2) *Treigle* v. *Acme Homestead Association*, 181 La. 941, 160 So. 637, decided March 4, 1935, rehearing denied April 1, 1935. This case involved some delicate constitutional questions on building and loan association law, petitioner being an expert in that field. Plaintiff succeeded in reversing the court below. He also appeared in the next four (4) companion cases, listed as (3), (4), (5) and (6):

(3) *Sokolsky* v. *Equitable Homestead Association*, 181 La. 970, 16 So. 646.

(4) *Treigle* v. *Thrift Homestead Association*, 181 La. 971, 160 So. 646.

(5) *Treigle* v. *Conservative Homestead Association*, 181 La. 972, 160 So. 647.

(6) *Mitchell* v. *Conservative Homestead Association*, 181 La. 973, 160 So. 648.

(7) *Goldsmith* v. *Parsons*, 161 So. 879, decision of the Court of Appeals for the Parish of Orleans, decided June 10, 1935. The matter was ably handled by petitioner.

(8) *Goldsmith* v. *Parsons,* 182 La. 123, 161 So. 175, decided February 4, 1935, rehearing was granted on petitioner's application.

(9) *Saia* v. *Phoenix Building & Homestead Association,* 182 La. 844, 162 So. 640, decided by the Supreme Court of Louisiana May 27, 1935, rehearing denied July 1, 1935.

(10) *Phoenix Building & Homstead Association* v. *Maloney,* 183 La. 547, 164 So. 410, Opinion November 4, 1935, rehearing denied December 2, 1935.

(11) *S. A. Calonge's Sons* v. *West Orleans Beach Corporation,* 164 So. 429, decision of the Court of Appeal for the Parish of Orleans December 16, 1935. Petitioner succeeded in reversing the judgment below.

(12) *Succession of Marion,* 183 La. 680, 164 So. 625, Supreme Court decision December 2, 1935. Motion was made to dismiss petitioner's appeal which was denied (See *Succession of Marion,* 163 La. 734, 112 So. 667).

(13) *Hymel* v. *Central Farms,* 183 La. 991, 165 So. 177, decided December 2, 1935.

(14) *Phoenix Building & Homestead Association,* 184 La. 783, 167 So. 441, decided March 30, 1936.

(15) *Morere* v. *Howard Odorless Cleaners,* 185 La. 130, 168 So. 709, decided April 27, 1936, rehearing denied May 25, 1936. Petitioner succeeded in reversing judgment below.

(16) *Harris* v. *Monroe Building & Loan Association,* 185 La. 289, 169 So. 343, decided April 29, 1935, rehearing June 30, 1936. Constitutional question was involved here.

(17) *Third District Land Company* v. *Geary,* 185 La. 508, 169 So. 538, decided June 30, 1936.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the District Court (R. 20, 21) was entered without opinion. The *per curiam* opinion of the Court of Appeals for the Fifth Circuit (R. 24, 25) is reported at 228 F. 2d 617.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 6, 1956 (R. 25). A petition for rehearing was denied on January 31, 1956 (R. 26). This Court entered its order allowing certiorari on June 4, 1956 (R. 26). The jurisdiction of this Court rests on 28 U. S. C. 1254.

tioner was represented by counsel, introduced evidence in his own behalf, and testified at length. He admitted to the Committee that he had written the signatures appearing on the note (R. 4). In defense, he sought to establish that at the time of the alleged forgery he was suffering from a form of insanity (R. 3).

After completion of its hearing, the Committee filed a petition in the Supreme Court of Louisiana for petitioner's disbarment on the ground that the evidence adduced before it proved that he was guilty of forging and uttering a note and appropriating the proceeds (R. 4). Petitioner excepted to the maintenance of the proceeding, on the ground, among others, that at the time he had performed these acts [he] "was suffering from a mental illness which rendered him incapable of guilty or wilful conduct and deprived him of the ability to distinguish right and wrong" (R. 6). Petitioner also raised exceptions of prescription, laches, and estoppel.

The exceptions were heard by the Louisiana Supreme Court which held that insanity was not a bar to disbarment. *Louisiana State Bar Association* v. *Theard,* 222 La. 327. As for the plea of prescription, the Supreme Court noted that respondent was confined to an insane asylum for some years and that he was under a judgment of interdiction from June 1941 until May 7, 1948, during which time disbar-

ment proceedings could not be brought against him;[3] and that any prejudice which he suffered as a result of the long delay could be shown when the merits of the case were considered.[4] The Supreme Court, accordingly, overruled petitioner's exceptions.

Following denial of petitioner's application for rehearing, he answered, reiterating the substance of his several exceptions including that of insanity, and contending that the proceeding operated to "deprive him

---

[3] The Louisiana State Bar Association began an investigation into complaints of misconduct against petitioner in 1937 but the investigation was abandoned at the request of petitioner's relatives because he was in a sanitarium (R. 9). It also appears from the decision in *State* v. *Theard*, 212 La. 1022, 1027, that on December 13, 1937, petitioner applied for the appointment of a lunacy commission in another criminal proceeding then pending against him; that on April 20, 1938, he was declared presently insane and incapable of assisting at his own defense; and that he was declared sane for purposes of standing trial on May 11, 1944. It further appears from the decision in *Louisiana State Bar Association* v. *Theard*, 222 La. 327, 337, that in June 1941, petitioner was adjudged to be an interdicted person incapable of caring for himself or his property and that this decree was not set aside until May 7, 1948.

[4] The court further noted that, in addition to the conduct specifically charged in the disbarment petition, petitioner had been involved in peculations involving "thousands of dollars belonging to his clients and others extending over a considerable period of time. In the petition, the charge has been limited to a single instance of forgery and uttering. However, counsel for respondent introduced in evidence newspaper clippings and other documents relative to the public scandal and agitation attendant to the discovery of respondent's embezzlements; forgeries and other breaches of trust, his arrest and subsequent incarceration in a sanitarium for mental diseases where he remained for a long time" (222 La. 327, 333, n. 2).

of the procedural due process guaranteed by Section 2 of Article 1 of the State Constitution and by the 14th Amendment to the Constitution of the United States" (R. 4–5).

After issue had been joined, the Louisiana Supreme Court set the matter for a hearing. It appointed a Commissioner to take evidence and report to it his findings of fact and conclusions of law (R. 5). On March 9, 1953, the Commissioner held a hearing in which the greater part of the evidence offered was that introduced in the proceeding conducted by the Committee on Professional Ethics and Grievances (R. 5).

After thoroughly reviewing the evidence, the Commissioner submitted to the Supreme Court of Louisiana a report recommending that petitioner be disbarred. He found that petitioner admitted the commission of the wrongful acts charged; that "it must then, from the record, be held that [petitioner] was suffering under an exceedingly abnormal mental condition, some degree of insanity" (R. 6); but that, as a matter of law, his abnormal mental condition at the time was not a defense to the disbarment proceedings (R. 6).

In the proceeding before the Supreme Court on the Commissioner's recommendation of disbarment, petitioner excepted to the conclusion that his mental condition at the time of the wrongful acts was not a defense to his disbarment (R. 7). The Committee on Professional Ethics and Grievances excepted to that part of the Commissioner's report which held

that petitioner "was suffering under an exceedingly abnormal condition, some degree of insanity" (R. 6, 11).

The Supreme Court adopted the Commissioner's ruling and again rejected the defense of mental illness in accordance with the view expressed in its earlier opinion. *Louisiana State Bar Association* v. *Theard*, 225 La. 98 (R. 2–12).[5] It therefore did not pass upon the Committee's exception. As to petitioner's claim of deprivation of constitutional rights, the court noted that the right to practice law is not "property" or "a natural or constitutional right," but rather, a privilege or franchise, which once granted falls under constitutional protection, *i. e.*, that "[b]efore a judgment disbarring an attorney is rendered, he should have notice of the grounds of the complaint against him and ample opportunity of explanation and defense" (R. 10–11). This requirement, the court held, "has been fully met in the instant proceeding" (R. 11). Accordingly, the court ordered petitioner's name removed from its rolls, and cancelled his license to practice law in Louisiana (R. 11–12). This Court denied certiorari. 348 U. S. 832.

2. Following the entry of the State order, the present proceeding to disbar petitioner in the District Court for the Eastern District of Louisiana was instituted (R. 1–2). The order to show cause referred to the State proceedings, a copy of which was attached

[5] The court noted that its earlier ruling on the mental illness defense "appears to be logically sound; it is supported by competent authority; and no holdings to the contrary have been brought to our attention" (R. 8).

(R. 2–12), and directed, in accordance with Rule 1 (f) of the District Court, *supra*, p. 2, that "unless [petitioner] shows good cause to the contrary within ten (10) days, an order of * * * disbarment * * * shall be entered" (R. 2). In response (R. 12–20), petitioner urged *inter alia* that the Louisiana court had disbarred him "without just cause or reason and by a decree depriving him of his property without due process of law" (R. 13) and that the decree of disbarment was based "on an act committed while [petitioner] was the victim of a mental breakdown, utterly bereft of reason, and unable to distinguish between right and wrong" (R. 13–14). In so urging, petitioner advised that "if [he] had been disbarred because of misconduct intentional and reprehensible for any reason involving moral turpitude or wilful wrong, [he] would not now undertake to show cause why the decree of the Louisiana Supreme Court should not be operative and binding in [the District] Court" (R. 13).[6]

A hearing was held before the District Court at which petitioner offered no evidence. Following the hearing, the District Court, without opinion, entered an order directing that the rule be made absolute and that petitioner's name be removed from the court's roll of attorneys (R. 20–21). On appeal the Court

[6] Attached to petitioner's response was a list of the cases he had since 1948 argued in the Louisiana Supreme Court and the Court of Appeals for the Parish of Orleans (R. 19–20).

of Appeals affirmed in a *per curiam* opinion (R. 24–25) stating:

> Appellant had the burden throughout these proceedings of showing good cause why he should not be disbarred. He offered no evidence and the legal contentions which he urges upon us are not persuasive.

This Court granted certiorari. 351 U. S. 961.

SUMMARY OF ARGUMENT

In this proceeding, petitioner challenges an order of the District Court for the Eastern District of Louisiana disbarring him from practice on the basis of a disbarment order of the Supreme Court of Louisiana because he had committed forgery and fraud. *Louisiana State Bar Association* v. *Theard*, 225 La. 98, certiorari denied, 348 U. S. 832.

Petitioner contends the District Court erred in relying upon the Louisiana proceedings because those proceedings were defective in three respects:

(1) Under the constitution of the State of Louisiana, the Supreme Court could not disbar him because the illegal acts with which he was charged were committed while he was insane;

(2) the disbarment proceedings against him were barred under Louisiana doctrines of prescription and laches because the forgery and fraud with which he was charged had been committed some sixteen years before the disbarment proceedings were initiated;

(3) the State proceedings violated petitioner's constitutional rights because it is a denial of due proc-

ess of law to disbar an attorney for acts of admitted misconduct committed while insane.

Petitioner's first two contentions are foreclosed by the familiar rule that this Court will not review authoritative interpretations of a State's law by its highest court except for conflict with the federal constitution or federal statutes. Further, the State court found that petitioner had made no showing that the delay between his misconduct and the initiation of the disbarment proceedings prejudiced his defense. Nor did petitioner offer evidence to make such a showing in the District Court.

1. Petitioner's contention that the State court proceeding denied him due process of law because it refused to accept his alleged insanity as a defense to the disbarment proceeding is erroneous. It must be noted that petitioner has never been found by any court to have been insane at the time of his fraud. Even if this fact were established, no constitutional right of petitioner is violated by a determination that insanity is not a defense in a disbarment proceeding. The District Court, therefore, acted properly in disbarring petitioner because he was disbarred by the State in which it sits.

An examination of the organization of the federal court system discloses that each federal court has an independent bar whose standards for admission or expulsion are largely conditioned by local requirements. Disbarment from a State court, following the practice of this Court, *Selling* v. *Radford*, 243 U. S. 46, is widely accepted as a ground for disbarment from the District Courts.

The Supreme Court of Louisiana disbarred petitioner because it found that his admitted forgery and fraud demonstrated that he was unfit to serve as an attorney. Challenging this ruling, petitioner contends that his disbarment for acts committed during his alleged derangement deprives him of his vested right to practice law. But it is axiomatic that there is no vested right to practice law. Standing at the bar is subject to substantial judicial protection. But the office of attorney is so permeated with public responsibility that the States may demand the highest qualifications of the practitioner and disbar him if he falls short of them. Cf. *In re Summers*, 325 U. S. 538; *Hawker* v. *New York*, 170 U. S. 189. Certainly, petitioner's admitted forgery and fraud, even if caused by a mental disease, afford a reasonable basis for inferring that he should not be licensed by the State to accept the high responsibilities of an attorney. This view has been shared by the other State courts which have considered the question. See *Re David Y. Patlak*, 368 Ill. 547; *Re Nicolini*, 262 App. Div. 114 (N. Y 1st Dept.). It cannot be said, therefore, that the judgment of the Supreme Court of Louisiana is so lacking in a rational basis as to constitute a denial of due process.

The petitioner relies upon *Wieman* v. *Updegraff*, 344 U. S. 183 and the dissenting opinions in *Barsky* v. *Board of Regents*, 347 U. S. 442. In *Wieman*, however, there was no public interest comparable to the interest operative here—the public's interest in the integrity and responsibility of the legal profession. It cannot be said that acts of theft or fraud, even

when committed under delusion, bear no rational connection to the question of whether their perpetrators should stand at the bar. For the same reasons, the dissents in *Barsky* v. *Board of Regents* are inapplicable.

2. In the absence of valid constitutional objection, it would be unwarranted for this Court, as a matter of judicial administration, to overturn the judgment below on the ground that the District Court had abused its discretion. The rule adopted by the State of Louisiana is, as already noted, accepted by other state courts. In view of the intimate relation between the District Courts and the bars of the States in which they sit, it cannot be an abuse of discretion for a District Court to adopt the same standard as that which prevails in its community. It is undesirable that one who is regarded by the State courts to be unfit for practice should be able to hold himself out as a lawyer because he has retained standing at the federal bar under a different set of governing rules.

For these reasons many courts, by rule or by decision, have adopted the test which this Court has developed to govern members of its own bar who have been disbarred in the States in which they were admitted. *Selling* v. *Radford,* 243 U. S. 46. Under this practice, the judgment of the State court is adopted unless the respondent shows that the State procedure was lacking in procedural due process, that the proof was insufficient to impeach the respondent's character or that some other grave reason exists for not adopting the State decision.

Because there is a wide range over which tribunals can disagree as to what constitutes the essential elements of this test, this Court will not interfere with a lower court's exercise of discretion in a disbarment proceeding except in a case in which the lower court's action is flagrantly improper. But the development of standards to govern the bars of the lower courts has been left to their discretion. On the facts in this case, the action of the District Court was a reasonable exercise of its power to maintain the integrity of the court and to protect the public from injurious acts which, however unintentional, have caused and may cause again substantial losses to helpless clients. For these reasons, we submit that there is no basis for a reversal of the order of the District Court.

3. Should this Court find that the alleged insanity of petitioner at the time he committed the illegal acts for which the State disbarred him is a defense in a disbarment proceeding, the case should be remanded in order that evidence may be adduced on this issue as well as on the extent of his recovery, with particular reference to the danger of a relapse or recurrence.

ARGUMENT

THE DISTRICT COURT'S ORDER OF DISBARMENT VIOLATED NO CONSTITUTIONAL RIGHT OF PETITIONER AND WAS A PROPER EXERCISE OF DISCRETION

INTRODUCTION

Petitioner challenges the order of the District Court for the Eastern District of Louisiana disbarring him from practice in that court on the ground that he was disbarred for professional misconduct by

the Supreme Court of Louisiana. He does not contend that the procedure in the State court denied him adequate notice or opportunity to be heard; or that the District Court's disbarment proceedings were deficient in this respect. He admitted in the State proceeding that he forged the names of two clients to a promissory note, that he used his position as a notary to utter the forged instrument as a genuine mortgage note, and then appropriated the proceeds. *Louisiana State Bar Association* v. *Theard,* 225 La. 98, certiorari denied 348 U. S. 832. But he argues that a mental disorder at the time, the nature of which is not established here, rendered him "unable to distinguish between right and wrong" (R. 9) and consequently absolves him of the high professional obligations which an attorney must otherwise bear; and that this absolution is so complete that the District Court must be reversed for disbarring him on the same grounds as the Supreme Court of Louisiana.

In sum, the petitioner contends that the District Court could not disbar him because the State court proceedings were defective in three respects:

(1) Under the Constitution of the State of Louisiana, the Supreme Court could not disbar him because the illegal acts with which he was charged were committed while he was insane.

(2) The disbarment proceedings against him were barred under Louisiana doctrines of prescription and laches because the forgery with which he was charged had been committed some 16 years before the disbarment proceedings were initiated.

(3) The State disbarment proceedings violated petitioner's constitutional rights because it is a denial

of due process of law to disbar an attorney for acts of admitted misconduct committed while insane.

Petitioner's first two contentions, we submit, are actually arguments that the Supreme Court of Louisiana erred in applying the law of that State to his case. His contention that the Supreme Court of Louisiana lacked jurisdiction to disbar him because of his alleged insanity is a challenge to that court's interpretation of Art. VII, Section 10, of the Constitution of the State of Louisiana.[6a] That interpretation, however, is final and binding upon this Court as an authoritative construction of Louisiana's law which cannot be reviewed here except for conflict with the federal constitution or federal statutes. *Randall* v. *Brigham,* 7 Wall. 523, 540–541; *Kirsh Lake* v. *Johnson,* 309 U. S. 485, 489; *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459.

Similarly, petitioner's arguments of laches and of prescription are attempts to raise here questions conclusively settled under State law by the State court. Petitioner specially pleaded prescription, laches and estoppel before the Supreme Court of Louisiana and that court ruled expressly that "the exception cannot be maintained." *Louisiana State Bar Association* v. *Theard,* 222 La. 327. The court found that petitioner had been under civil interdiction until 1948, an earlier investigation had been deferred at his uncle's request because of petitioner's condition, and petitioner made no showing that the delay prejudiced the preparation of his defense (see R. 12–13). Since petitioner of-

[6a] The Supreme Court * * * shall have exclusive original jurisdiction in all disbarment cases involving misconduct of members of the bar * * *."

fered no evidence to make such a showing in the District Court, this ruling definitively forecloses the question here.

Petitioner's principal attack upon the judgment of the Supreme Court of Louisiana and thereby the judgment of the District Court is based upon his contention that he was disbarred by the Supreme Court of Louisiana for forgery and theft committed while he was allegedly insane, and that the Supreme Court's refusal to accept insanity as a defense to the disbarment proceeding denied him due process of law. It follows, in his view, that the District Court should not have based its determination on the State proceeding.

At the outset, it should be noted that whether or not petitioner was insane at the time of the breach of trust has not been passed on by the District Court nor, for that matter, by the Supreme Court of Louisiana. In the view taken by these courts, that issue was immaterial so long as the misconduct had been admitted. In no proceeding, therefore, has petitioner been declared to have been insane at the time he committed the illegal acts.

Petitioner appears to suggest the contrary in his brief. He says that the decision of the Supreme Court of Louisiana in *State* v. *Theard,* 212 La. 1022, held that he was insane at the time he committed the forgeries and theft. But that case made no such finding. It was an appeal by the State from a dismissal in 1947 of an information for embezzlement involving another client which was filed on September 1, 1936. The information was dismissed because the

State had not brought the matter to trial within the three-year prescription period required by the Louisiana law. In affirming the dismissal, the Supreme Court noted that on December 13, 1937, at the time trial was to commence, Theard had been declared *presently* insane and unable to understand the proceedings against him or to assist in his defense; but that on May 11, 1944, Theard was adjudged to have been restored to sanity. The court ruled that the period from September 1, 1936, when he was charged, to December 13, 1937, when he was declared *presently* insane, could properly be added to the period between the date he was declared to have regained his sanity and the date on which he was finally arraigned. The total period exceeded three years and the case was, therefore, properly dismissed. There was then no ruling by the court as to petitioner's sanity at the time of his forgery and defalcation.

While it is true that the Commissioner who conducted the disbarment proceedings for the Supreme Court of Louisiana concluded that "respondent 'was suffering from an exceedingly abnormal condition; some degree of insanity'", this finding was excepted to by the Louisiana State Bar Association, and was not adopted or rejected by the Supreme Court because that court considered it unnecessary to pass upon Mr. Theard's mental state, in view of its holding that the state of his mind at the time the acts were committed was immaterial. See *Louisiana State Bar Association* v. *Theard*, 225 La. 98, certiorari denied, 348 U. S. 842 (R. 11).

In these circumstances, the question here turns on whether the State court's judgment ordering disbarment for admittedly improper and illegal conduct, regardless of intent, violated petitioner's constitutional rights so as to constitute an improper basis for his disbarment by the District Court. In considering that question, a brief review of the prevailing practice of the District Courts with respect to disbarment may prove helpful.

1. *Present Practice in District Court Disbarment Proceedings*

The present federal procedures with respect to admissions and disbarments underline the intimate relationship which exists between the bars of the several States and the bars of the United States District Courts.

a. *Admissions.*—Admission to the highest court of the State in which the District Court sits qualifies for admission to the bar of the District Court in all of the States. In many jurisdictions, this is an indispensable requirement. In others, admission to the highest court in any State qualifies an applicant.[7] As this Court has indicated, the practice of the District Courts recognizes that it is "the States whose function it has traditionally been to determine who shall stand to the bar." *In re Isserman,* 345 U. S. 286, 287; cf. *In re Summers,* 325 U. S. 561.

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[7] A detailed analysis of the rules and practices governing admission to the district court bars is contained in Survey of the Legal Profession, *Bar Examinations and Requirements for Admission to the Bar* (Ch. III) (1952).

In adopting this course, the District Courts have accommodated to the most striking feature of our federal system—that the federal District Courts function as national tribunals operating against the background of the *corpus juris* of the States in which they sit. Cf. Hart & Wechsler, *The Federal Courts and the Federal System*, 435. Their districts are organized to serve the same communities as the courts of the States; in the exercise of their diversity jurisdiction they enforce the same substantive law as the courts of the States; and they look to the bars of the States as the primary source from which their own bar is drawn.

In consequence, the standards for admission (or expulsion) from the bars of the federal District Courts have been as varied as the widely diversified practices of the States. No uniform rule has ever been established for regulation of the District Court bars by the Congress or by this Court in the exercise of its rule-making powers. *Bar Examinations & Requirements for Admission to the Bar*, 141. See footnote 1, *supra*, p. 2. Indeed, the chief recommendation in the *Survey of the Legal Profession* has been that all District Courts make membership in the bar of the State in which they sit an indispensable requirement. *Bar Examinations & Requirements for Admission to the Bar*, 141. In short, there is no unified federal bar as such, but a congregation of many independent bars reflecting a wide variety of

local conditions and requirements.[8] See *In re Wasserman* (C. A. 9, Oct. 2, 1956).

b. *Disbarments.*—Once an attorney has been admitted to practice in the District Courts he will not be disbarred except for serious delinquencies which reflect discredit upon the legal profession and the courts, or which demonstrate that he is not fit to continue the high responsibilities of an attorney at law. *Ex parte Wall,* 107 U. S. 265; *Ex parte Garland,* 4 Wall. 333.

We have prepared in tabular form, and set out in the appendix to this brief, an outline of the existing District Court rules with respect to disbarment of attorneys from the rolls of the District Courts following state disbarment of those attorneys. *Infra* pp. 35–37. A review of these rules indicates that some twenty-six District Courts automatically disbar attorneys admitted to practice before the District Courts, without further hearing, upon a showing that the attorney has been disbarred by the State court. Approximately twenty-two District Courts have adopted the rule followed by the District Court in the instant case—disbarring an attorney upon a showing of state disbarment, unless he shows good cause to the contrary. Ten District Courts have promulgated rules which effect disbarment upon independent inquiry

[8] Since 1789 each federal court has been responsible for the management of its own bar. The Act of September 24, 1789, Sec. 35, 28 U. S. C. 1654 provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

without relation to state action. The remaining twenty-six courts have promulgated no formal rules.

We find, therefore, that disbarment from the courts of a State has been widely accepted as a ground for concluding that the disbarred attorney lacks "the private and professional character" which is required for membership in the bar of the District Courts. See *Selling* v. *Radford,* 243 U. S. 46. This rule is not followed as a matter of comity but as a substantive standard for continued standing at the bar. *In re Isserman,* 345 U. S. 286.

With this background, we turn to discuss the adoption by the Eastern District of Louisiana, in petitioner's case, of the ground for disbarment relied upon by the Supreme Court of the State in which it sits.

2. No constitutional right of petitioner has been violated

The Louisiana Supreme Court expressly ruled that petitioner's claimed mental disorder (whether so or not) at the time he forged his clients' name did not excuse him from his obligations and duties as an attorney (*Louisiana State Bar Association* v. *Theard,* 222 La. 327, 335–336):

> * * * In disbarment, unlike criminal prosecution or a civil suit for recovery of money based on an offense or quasi offense, consideration of the interest and safety of the public is of the utmost importance for, whereas it may not be humane to punish by confinement to prison one who labored under the inability to understand the nature of his wrongful acts, it is quite another matter to permit such a person to continue as an officer of the court and

> to pursue the privilege of engaging in the honorable profession of counsellor-at-law when he, by his misconduct, has exhibited a lack of integrity and common honesty. And in our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent.

The Supreme Court thus found that petitioner's conduct had shown him to be one who cannot properly serve as an officer of the court and be trusted to advise and represent clients. We cannot say, that in so ruling, its judgment violated petitioner's constitutional rights.[9]

Petitioner urges that Louisiana's finding that he is unfit for the bar because he has committed forgery and fraud while allegedly deranged deprives him of his vested right to stand at the bar. But it is a postulate of our jurisprudence that membership in the bar is not an absolute and indefeasible right. True, the right of an attorney to appear and argue before a court, once granted, "is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency." *Ex parte Garland,* 4 Wall. 333, 379. However, when there has been appropriate notice and opportunity to defend—and the record here clearly shows that these

[9] This holding was reaffirmed in the Louisiana Supreme Court decision reported at 225 La. 98, (R. 2–12), as to which this Court denied certiorari, 348 U. S. 832.

rights were fully accorded petitioner (see the Statement, *supra*, pp. 3–4, 6)—the nonarbitrary determination of a court that the conduct of an attorney of its bar has constituted "moral or professional delinquency" does not present any question for review.

As Mr. Justice Bradley wrote for this Court in *Ex parte Wall*, 107 U. S. 265, 288–289,

> * * * the action of the court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. * * * This being so, the question whether a particular class of cases of misconduct is within its scope, cannot involve any constitutional principle.

An attorney may be disbarred for a wide range of delinquencies. See Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 Col. Law Rev. 1039; Phillips and McCoy, *Conduct of Judges and Lawyers*, Chap. VI; Drinker, *Legal Ethics*, Chap. III. Gross malpractice, dishonesty, or any "conduct greatly affecting his professional character," *Ex parte Wall*, 107 U. S. 265, 273, are traditional grounds for removing persons who are unfit.

The privilege of practicing law, like that of medicine, is so permeated with public responsibility that

the States may demand the highest qualifications of the practitioner (*In re Summers,* 325 U. S. 538; *Hawker* v. *New York,* 170 U. S. 189), and oust him if he does not meet them. Such an ouster "is not by way of punishment; but the Court on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not." *Ex parte Brounsall,* 2 Cowper 829 (K. B. 1778). Disbarment of the unfit is simply an exercise of (*In re Isserman,* 345 U. S. 286, 289):

> * * * a right in the Court to protect itself, and hence society as an instrument of justice. That to the individual disbarred there is a loss of status is incidental to the purpose of the court and cannot deter the court from its duty to strike from its rolls one who has engaged in conduct inconsistent with the standard expected of officers of the Court.

It is for Louisiana to decide what substantive standard of character shall serve to determine the persons who may remain members of its bar. *In re Summers,* 325 U. S. 561. "We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test." *Hawker* v. *New York,* 170 U. S. 189, 195. Cf. *Barsky* v. *Board of Regents,* 347 U. S. 442.

Under these principles, the standard which Louisiana has adopted is not so unreasonable as to "violate a principle of justice so rooted in the tradition and conscience of our people as to be ranked as funda-

mental", *Palko* v. *Connecticut*, 302 U. S. 319, 325. Thefts, embezzlements and forgeries, even where caused by mental disease, afford a reasonable basis for inferring that he who commits them should not be licensed by the State to accept fiduciary responsibilities, at least in the absence of the strongest proof that these aberrations will not recur. There is generally an ever present possibility of a recurrence of anti-social conduct even after one who has committed such acts is restored to that minimum of self-control which is accepted as sanity for civil purposes. The State of Louisiana has, by removing his civil interdiction, found petitioner fit to manage his own affairs. But the question is whether, in the light of his overt breaches of trust in the past, petitioner should be entrusted as a lawyer to manage the affairs of others.

Significantly, the conclusion reached by the State of Louisiana on whether insanity is a defense to disbarment based upon gross misconduct has been shared by the other state courts which have considered the question. See, *Re David Y. Patlak*, 368 Ill. 547; *Re Nicolini*, 262 App. Div. 114 (N. Y., 1st Dept.); cf. *Re Vincent*, 282 S. W. 2d 335 (Ky.); *Re Manahan*, 186 Minn. 98, 101; *Re Bivona*, 261 App. Div. 221, 222 (N. Y., 1st Dept.); *Re Creamer*, 201 Ore. 343; *In Re Kennedy*, 178 Pa. 232. See the discussion *infra*, pp. 28–29. Even though it is recognized that different courses of decision are available, we cannot say that the view of these States so offends fundamental standards of justice as to constitute a violation of the Constitution.

Petitioner's reliance upon this Court's decision in *Wieman* v. *Updegraff*, 344 U. S. 183, and the dissenting opinions in *Barsky* v. *Board of Regents*, 347 U. S. 442, is misplaced. In *Wieman* v. *Updegraff*, a loyalty oath which indiscriminately classified innocent with knowing membership as a prohibitive standard for public employment was invalidated as arbitrary. In that case, there was no balancing public interest which could offer even slight justification for the course which the State had adopted. In this case, there is an overwhelming counter-balance to petitioner's claims—the interest of the public in the integrity and responsibility of the legal profession. The profession has no place for the deranged thief, forger or embezzler. Such persons, however innocent of criminal intent, cannot safely be admitted to the legal profession, because by the test of proven anti-social acts they have shown themselves to be untrustworthy and irresponsible. They are not excluded from the bar to punish them in order to deter others, or even to reform themselves. They are excluded to protect the courts as instruments of justice and the public from ministrations which, however unintentional, have caused and may again cause substantial losses to innocent clients.[10] Cf. *Ex parte Wall*, 107 U. S. 265, 288. Even if petitioner had committed the dishonest acts while insane, in the present state of psychiatric knowledge it cannot be said with a sufficient degree of certainty that a person with as long a period of

[10] In *Barsky* v. *Board of Regents*, 347 U. S. 442, the dissenting Justices felt that the crime of which Barsky had been convicted had no relation to his fitness or capacity to practice medicine.

hospitalization as petitioner had is now so normal that it is arbitrary for the State to take the preventive measure of striking his name from the attorneys' roll.[11]

We submit, therefore, that the Louisiana Supreme Court, in disbarring petitioner from the State courts, deprived him of no constitutional right under the Fourteenth Amendment. And it necessarily follows that the District Court, in following the State Supreme Court, deprived petitioner of no constitutional right under the Fifth Amendment.

3. *The Judgment of the District Court Was a Proper Exercise of Discretion in the Circumstances of This Case*

Absent valid constitutional objection, the issue is whether this Court, as a matter of judicial administration, should overturn the practice of the District Court for the Eastern District of Louisiana and other District Courts adopting the rule followed here, on the ground that its application was such a gross abuse of discretion as to require reversal. We suggest that such a conclusion would be unwarranted.

We need not stress again that into the hands of the legal profession is given the fortune, freedom and even the lives of the men and women who turn to it for aid. As officers of the court they share with the court the responsibility for the administration of justice. Scrupulous policing by the profession and the courts when evidence of misconduct occurs affords

[11] Petitioner offered no evidence in the District Court and did not undertake to prove, by expert testimony, that his mental condition would not recur.

the chief assurance to the public that its rights will be diligently protected and enforced, the client's trust faithfully discharged, and his property honestly administered and protected. "Much of the public suspicion of lawyers is due to the realization that most of the abuses of which lawyers are guilty could be eliminated if the bar and the courts were constantly alert and willing to do their full duty in this regard." Drinker, *Legal Ethics,* 59–60.

The high standard which the profession must enforce within itself and the responsibility of the courts in seeing that this enforcement is carried out supports the determination of the District Court in the instant case.

As we have already suggested, it can hardly be called unreasonable to protect the public from the individual, who, from reasons of mental disorder or otherwise, has demonstrated that he is unfit to discharge the duties and obligations of his profession, and has not affirmatively proved that this unfitness has been removed or that the derelictions will not recur.

This view has been shared by many state courts. The Supreme Court of Illinois, considering the same question, has said in a disbarment proceeding involving an attorney who converted funds of his clients but was later acquitted by reason of insanity (*In re Patlak,* 368 Ill. 547, 553):

> * * * While insanity proved, is a defense to a criminal charge, yet a disbarment proceeding is for more than the single purpose of punishment. There is also the even more

> important purpose of protecting the public from unscrupulous and dishonest lawyers. Though a man be shown to be insane, the public have a right to protection against his activities in the practice of law, particularly when the symptoms of his insanity include a penchant for keeping the money of others without rendering services or account therefor.

The same ruling has been adopted by other jurisdictions which have considered the question. *In re Kennedy*, 178 Pa. 232; *Matter of Bivona*, 261 App. Div. 221 (N. Y., 1st Dept.); *In re Chmelik*, 203 Minn. 156. There appears to be no case to the contrary.

The rationale of these cases has been well expressed by the Supreme Court of Minnesota which said (*In re Manahan*, 186 Minn. 98, 100–101):

> There is much in the unfortunate situation that appeals to the sympathy of the court * * * But for the honor of the profession and the protection of the public there is, in our judgment, no other course open for the court than the exclusion of an attorney from the right to practice law who not only knowingly misappropriate moneys not belonging to him but also deliberately and wrongfully indorses checks in order to obtain the money of others. That his physical condition through inheritance or otherwise subjects him at times to suffering so painful as to affect his mind is pitiable, but does not justify the court in taking chances that, were he again permitted to practice, relapses might occur during which clients in the future would suffer as in the past.

We do not suggest that the rule that was adopted by the State of Louisiana is necessarily the rule that must be followed by all federal courts. We do say, however, that the adoption of such a standard and its application to the instant case cannot be said to be so unreasonable or unjust as to constitute an abuse of discretion.

This is particularly so when the intimate relationships between the Federal District Courts and the bars of the jurisdictions in which they sit are considered. It is difficult to find an abuse of discretion where the District Courts adopt the same standards for disbarment that govern in the States in which they sit. See *In re Wasserman*, (C. A. 9, Oct. 2, 1956). As already noted (*supra*, pp. 18–21), the District Courts depend primarily upon the standards for admission which the courts of the States in which they sit have adopted. It does not seem unreasonable for the District Courts to follow the standards of the State courts in disbarment. For it is generally undesirable that one who is regarded by the State courts as unfit for practice should be able to hold himself out to the community as a lawyer because he has retained standing at the federal bar under a different set of standards. The creation of such a conflict or inconsistency would tend to lead to a disruption of State efforts to maintain a responsible bar, as well as to confusion on the part of the public.[12]

[12] Rule 1 (f) of the Eastern District of Louisiana imposes on an attorney disbarred in any other court the burden of showing

It is for these reasons that many District Courts have adopted the practice which this Court developed to govern members of its own bar who had been disbarred in the States from which they were admitted. *Selling* v. *Radford,* 243 U. S. 46. The Eastern District of Louisiana, the practice of which is challenged here, adopted it by rule. Other courts have adopted it by decision or by construction of their existing rules. *In re Tinkhoff,* 101 F. 2d 341 (C. A. 7) leave to file petition for mandamus denied 296 U. S. 548; *In re Adair,* 34 F. 2d 663 (D. Del.); *In re Barton,* 54 F. 2d 810 (N. D. Cal.); *In re Noel,* 93 F. 2d 5 (C. A. 8). See the discussion, *supra* pp. 18–21, and Appendix, *infra* pp. 35–37.

Under this practice, the judgment of the State court will be adopted unless the respondent shows (*Selling* v. *Radford,* 243 U. S. 46, 51):

> 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an in-

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"good cause" why that disbarment should not automatically operate to effect his disbarment in the Eastern District. *Supra,* p. 2. It seems entirely reasonable that the District Court should be able to accept at face value a disbarment order of the Louisiana Supreme Court, unless and until the disbarred attorney bears his burden of showing that disbarment in the federal court should not automatically follow. In that connection, we note again that petitioner introduced no evidence in the District Court proceeding and made no effort to prove that the earlier derelictions and alleged insanity would not recur. (See R. 25.)

> firmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do.

Of course, there can be and is a wide range over which tribunals may reasonably differ as to what constitutes a "grave reason" for not following a State judgment of disbarment, or as to the elements of proof that good character is lacking. Therefore, in reviewing proceedings of lower federal courts to discipline their own bars, this Court has always felt "the delicacy of imposing its authority" * * * and has not been "inclined to interfere unless it were in a case where the conduct of the circuit court was irregular, or was flagrantly improper." *Ex parte Burr,* 9 Wheat. 529.

Consequently, this Court has not attempted to impose its own judgment as to the proper local criteria for standing at the bar except where improprieties were patent. The Court has corrected a lower court which denied admission to the bar upon a record which plainly showed no reasonable grounds for a refusal to grant admission (*In re Levy,* 348 U. S. 978), and it has reduced the sanction of disbarment to a less severe punishment where the circumstances

did not warrant disbarment. *Sacher* v. *Association of the Bar*, 347 U. S. 388. The test, as announced over a century ago by Mr. Chief Justice Marshall in the *Burr* case, is whether there has been some grave abuse of the wide discretion which the lower courts require for the proper regulation of their bars. But the development of standards to guide that discretion has been left to them.

In the total circumstances of this case—including petitioner's failure to present any pertinent evidence in the District Court (see R. 25)—we submit that the action of the District Court was a reasonable exercise of its power to maintain the integrity of the court as an instrument of justice and protect the public, regardless of the intent of the attorney, against injurious activities in the practice of law.

4. *Should this Court find the action of the District Court to be a gross abuse of discretion, the case should be remanded for further proceedings*

As we have already shown, the record in this case indicates that the court below, following the Supreme Court of Louisiana, found it unnecessary to determine whether the petitioner was sane at the time he committed the illegal acts. If this Court should now find that the insanity of the petitioner at the time he committed the illegal acts prevents the District Court from entering an order of disbarment, the case should be remanded to that court in order that evidence may be adduced on this issue. Further, we would also suggest that the present state of mind of the petitioner should be the subject of pertinent inquiry, with par-

ticular reference to the danger of a relapse occurring during which clients in the future might suffer as have those in the past.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed. In the alternative, the case should be remanded so that evidence may be adduced as to the state of mind of the petitioner at the time the illegal acts were performed and whether at the present time there may be a danger of relapse or recurrence.

Respectfully submitted.

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NOVEMBER 1956.

APPENDIX

United States District Court Rules Concerning the Effect of State Disbarment Upon Their Attorneys [1]

District	State Disbarment Results in Automatic Disbarment, With No Provision for a Hearing	State Disbarment Results in Disbarment Unless Good Cause Shown	Independent Hearing With No Reference Made to State Disbarment	No Rules Pertaining to Disbarment
Alabama:				
Northern				X
Middle				X
Southern	X			
Arizona		X		
Arkansas:				
Eastern	X			
Western	X			
California:				
Northern			X	
Southern		X		
Colorado	X			
Connecticut		X		
Delaware				X
Florida:				
Northern				X
Southern				X
Georgia:				
Northern		X		
Middle				X
Southern				X
Idaho			X	
Illinois:				
Northern	X			
Eastern		X		
Southern		X		
Indiana:				
Northern				X
Southern				X
Iowa:				
Northern		X		
Southern		X		
Kansas	X			
Kentucky:				
Eastern				X
Western			X	
Louisiana:				
Eastern		X		
Western		X		
Maine	X			
Maryland				X
Massachusetts				X

See footnotes at end of table.

United States District Court Rules Concerning the Effect of State Disbarment Upon Their Attorneys[1]—Continued

District	State Disbarment Results in Automatic Disbarment, With No Provision for a Hearing	State Disbarment Results in Disbarment Unless Good Cause Shown	Independent Hearing With No Reference Made to State Disbarment	No Rules Pertaining to Disbarment
Michigan:				
Eastern		X		
Western		X		
Minnesota	X			
Mississippi:				
Northern				X
Southern				X
Missouri:				
Eastern			X	
Western			X	
Montana	[2] X			
Nebraska		X		
Nevada	[2] X			
New Hampshire		X		
New Jersey	X			
New Mexico	X			
New York:				
Northern	X			
Southern	X			
Eastern	X			
Western	X			
North Carolina:				
Eastern			X	
Middle			X	
Western			X	
North Dakota	X			
Ohio:				
Northern		X		
Southern				X
Oklahoma:				
Northern	X			
Eastern	X			
Western	X			
Oregon		X		
Pennsylvania:				
Eastern				X
Middle				X
Western		X		
Rhode Island				X
South Carolina:				
Eastern		X		
Western		X		
South Dakota	X			
Tennessee:				
Eastern				X
Middle				X
Western				X

United States District Court Rules Concerning the Effect of State Disbarment Upon Their Attorneys [1]—Continued

District	State Disbarment Results in Automatic Disbarment, With No Provision for a Hearing	State Disbarment Results in Disbarment Unless Good Cause Shown	Independent Hearing With No Reference Made to State Disbarment	No Rules Pertaining to Disbarment
Texas:				
Northern				X
Southern	X			
Eastern			X	
Western	X			
Utah	X			
Vermont				X
Virginia:				
Eastern				X
Western				X
Washington:				
Eastern			X	
Western		X		
West Virginia:				
Northern	X			
Southern	X			
Wisconsin:				
Eastern		X		
Western		X		
Wyoming				X
Totals	26	22	10	26

[1] The District Court for the District of Columbia and the District Courts of the territories are not included in this tabulation. This survey is based on District Court rules filed with the Department of Justice.

[2] State disbarment is sufficient cause for disbarment.